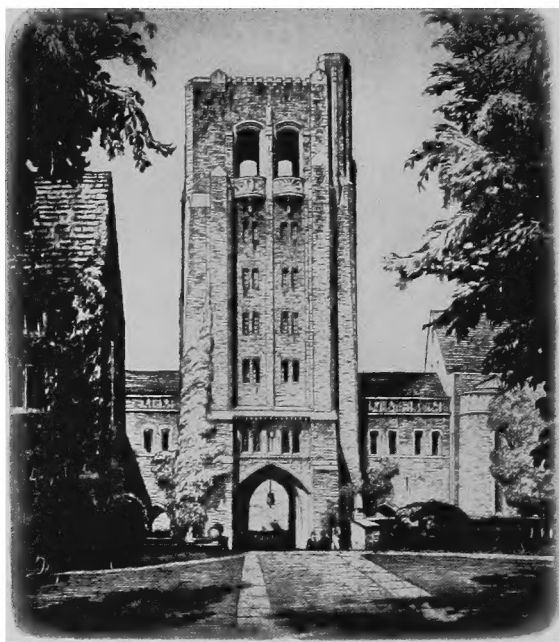




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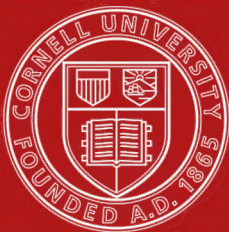
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THE LAW  
OF  
STREET RAILROADS

A COMPLETE TREATISE

ON THE LAW RELATING TO THE ORGANIZATION OF STREET  
RAILROADS, THE ACQUISITION OF THEIR FRANCHISES AND  
PROPERTY, THEIR REGULATION BY STATUTE AND  
ORDINANCE, THEIR OPERATION AND LIABILITY  
FOR INJURIES TO THE PERSON AND PROPERTY  
OF PASSENGERS, EMPLOYEES AND TRAV-  
ELERS AND OTHERS ON THE PUBLIC  
STREETS AND HIGHWAYS, IN-  
CLUDING ALSO PLEADING  
AND PRACTICE

BY  
ANDREW J. NELLIS

SECOND EDITION

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VOL. II

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§ 322. Liability as to free passengers and trespassers — Duty of company. — Children riding on street cars free of charge, by invitation or permission of the conductor, are not trespassers and have the rights of a passenger as we have already shown, to the extent of being entitled while aboard the cars to the degree of care and diligence due to passengers of their age and discretion and apparent ignorance and helplessness.<sup>1</sup> A street railway company is not an insurer of the safety of infant trespassers and is not required to anticipate their presence on its cars. And is not bound to guard its cars so as to prevent trespassing children from getting off or on while in motion. But if a street railway employee discovers a child upon his car in a dangerous position he should exercise such care and caution for its safety and protection as would be reasonable under all circumstances considering the age and maturity of the infant and his capacity to comprehend and appreciate the danger of his surroundings.<sup>2</sup> A street railway company owes the duty of preventing children of such tender years that negligence cannot be imputed to them from being on the platform of a moving car, and, if such a child gets there without permission, failure to remove it from its position of danger as soon as discovered is negligence.<sup>3</sup> A street railroad company owes a trespasser no duty of protection. Its servants have the right to remove him from the car, but in so doing they are required to subject him to no unnecessary hazard. They have no

1. See cases cited in sections 249-261, as to who are passengers.

2. *Goldstein v. Peoples Ry. Co.*, 5 Penn. (Del.) 306, 60 Atl. 975.

3. *Levin v. Second Ave. Tract. Co.*,

201 Pa. St. 58, 50 Atl. 225; *Railway Co. v. Caldwell*, 74 Pa. St. 421; *Barre v. Railway Co.*, 155 Pa. St. 170, 26 Atl. 99.

right to seize him and throw him from the car while it is in motion, or to so violently assault or frighten him as to cause him to fall from the car. In order to justify a recovery, however, the act of the defendant's servants must have been improper, unnecessarily dangerous, the proximate cause of the injury, and done for the purpose of removing the plaintiff from the car.<sup>4</sup> A railway company owes to a trespasser the duty of using ordinary care in removing him from its cars; and not to wilfully or recklessly injure him after discovering him on its cars.<sup>5</sup> If the employees use more force than is reasonably necessary, no matter whether they think they are not using excessive force, the company is liable for their acts.<sup>6</sup> And a conductor has no right, by demonstration and ejaculation, to produce fear and thus cause a boy trespassing upon a car to attempt to alight or to loose his hold, if by doing so he unnecessarily exposes the boy to the hazard of injury. If the conductor causes the boy to act involuntarily and destroys the care and caution for the protection of his person which he would otherwise have exercised and from which injury results, such act is without authority and renders the street railway company liable.<sup>7</sup>

4. *Ansteth v. Buffalo Ry. Co.*, 145 N. Y. 210, 214, 39 N. E. 708, 64 St. Rep. (N. Y.) 598; *Nussbaum v. Louisville Ry. Co.*, 22 Ky. L. Rep. 271, 57 S. W. 249; *Jackson v. St. Louis S. W. Ry. Co.*, 52 La. Ann. 1706, 28 So. 241; *North Chicago St. R. Co. v. Olds*, 165 Ill. 472; affg. 64 Ill. App. 595, 1 Chic. L. J. Wkly. 356; *Day v. Brooklyn City R. Co.*, 12 Hun (N. Y.) 435; *McCann v. Sixth Ave. R. Co.*, 117 N. Y. 505, 23 N. E. 164; *Murphy v. Central Park, etc., R. Co.*, 48 N. Y. Super. Ct. 96; *North Chicago City R. Co. v. Gastka*, 128 Ill. 613, 21 N. E. 522; *Hestonville & M. F. P. Ry. Co. v. Biddle*, (Pa.) 16 Atl. 488. And see *Biddle v. Hestonville M. & F. P. Ry. Co.*, 112 Pa. St. 551, 4 Atl. 385.

5. *Drogmund v. Metropolitan St. Ry. Co.*, 122 Mo. App. 154, 6 St. Ry. Rep. 21, 98 S. W. 1091, holding that in such case an instruction, requested by defendant, was properly refused, which in effect told the jury that, as the boy was not a passenger, it was the duty of the conductor to prohibit him from riding, and, if the boy stepped from the train at the command of the conductor, then the plaintiff could not recover.

6. *Citizens' St. Ry. Co. v. Willoeby*, 134 Ind. 563, 58 Am. & Eng. R. Cas. 485, 33 N. E. 627; *Lake Erie & W. R. Co. v. Matthews*, 13 Ind. App. 355, 41 N. E. 842.

7. *Ansteth v. Buffalo Ry. Co.*, 9 Misc. Rep. (N. Y.) 419, 30 N. Y. Supp. 197; affd., 145 N. Y. 210, 39 N. E. 708.

A street railway should be held to a strict accountability for any reckless or wanton abuse of the implied authority placed in a conductor to keep trespassers off the car under his control.<sup>8</sup> But it is held that a street railway company owes no duty to a trespasser except to refrain from wilfully, wantonly, or recklessly exposing him to danger.<sup>9</sup> Where a boy twelve years of age recklessly boarded a moving car, with the consent of the gripman, and was permitted by the gripman to ring the bell, but the conductor ordered him to cease ringing the bell, and, on his refusal so to do, advanced toward him in a threatening manner with a broom, while the car was in motion, causing the boy to lose his equilibrium and fall from the car, the act of the conductor was wanton and reckless, and the railway company was liable for the injury under the humanitarian doctrine.<sup>10</sup> Where, while a boy was driv-

8. *North Chicago City Ry. Co. v. Gastka*, 27 Ill. App. 518.

9. *Massell v. Boston Elevated Ry. Co.*, 191 Mass. 491, 5 St. Ry. Rep. 450, 78 N. E. 108.

A street railway company is liable for injuries suffered by a small boy while jumping from a moving car by direction of a motorman or conductor of the car when intimidated by such direction. *Richmond Traction Co. v. Wilkinson*, 101 Va. 394, 43 S. E. 622.

10. *Drogmund v. Metropolitan St. Ry. Co.*, 122 Mo. App. 154, 6 St. Ry. Rep. 21, 98 S. W. 1091. The court said: "The defendant asked the court, in instruction numbered 4, to say to the jury in effect that, as the boy was not a passenger, it was the duty of the conductor to prohibit him from riding, and, if the boy stepped from the train at the command of the conductor, then the plaintiff could not recover. The court refused to so instruct the jury. Taking into consideration the youth of the boy, his want of discretion, and the probabil-

ity of his obeying the command of the conductor, we are of the opinion that the act of the conductor, taking into consideration the circumstance that the car was moving at a dangerous rate of speed, would be a violation of the humanitarian doctrine as we understand it, and the instruction ought not to have been given."

But while plaintiff, a boy twelve or thirteen years of age, jumped upon a projection from the rear end of one of defendant's street cars and while hanging on rode about the length of a car, and the conductor came out and spit at him and made a punch at his face, whereupon he jumped off, and at that instant another car on a parallel track was approaching and, as he jumped off, he staggered and ran close to it and was struck by the approaching horses and severely injured; it was held that in order to recover he must show that the acts causing him to jump from the car were wilfully and wantonly

ing a street car at the invitation of the conductor, some other boys got upon the car and upon their refusal to get off the conductor made a pretense to catch them, whereupon they scrambled from the car, and in doing so pushed the plaintiff, who was driving the car, from the platform, in consequence of which he was run over and injured, it was held that assuming the boy to have been a trespasser and that the act of the conductor in making a motion to catch the other boys constituted negligence as to them, the railway company was not liable for the injuries sustained by the boy driving the car, as the conductor's act was not the proximate cause of such injuries which resulted in the acts of other persons not reasonably to be anticipated as a consequence of the conductor's act.<sup>11</sup> In the absence of evidence, it cannot be said that a motor-man, whose only apparent duty is to operate the machinery that furnishes the motive power for the car, has any authority from his master to eject a boy who is riding as a trespasser, and it is declared that the burden of proof of showing such authority is on a plaintiff.<sup>12</sup> A carrier may lawfully contract with a passenger carried gratuitously that such passenger will take upon himself all risk of personal injury from the negligence of the servants and agents of the carrier for which the carrier would otherwise be liable.<sup>13</sup>

inflicted. *Hagestrom v. West Chicago St. Ry. Co.*, 78 Ill. App. 574, 67 Ill. App. 263.

In the case of *Barre v. Reading City Pass. Ry. Co.*, 155 Pa. St. 170, 26 Atl. 99, it appeared that plaintiff, a child between eleven and twelve years of age, was run over by a car on defendant's railway, receiving personal injuries. The plaintiff and two companions, aged between eleven and twelve, testified in substance that plaintiff caught the front platform of the car while it was in motion, having hold of the two hand-rails, and that the driver saw her; that he whipped his horses, making them go

at a fast rate, then beat the plaintiff upon the hands to make her let go, and finally pushed her off the car, so that she fell under and was run over. The jury having found that the testimony of the two children was true, a verdict in the plaintiff's favor was proper.

**11.** *Marks v. Rochester Ry. Co.*, 41 App. Div. (N. Y.) 66, 58 N. Y. Supp. 210.

**12.** *Drolshagen v. Union Depot R. Co.*, 186 Mo. 258, 3 St. Ry. Rep. 489, 85 S. W. 344.

**13.** *Indianapolis Traction & Term. Co. v. Klentschy*, 167 Ind. 598, 5 St. Ry. Rep. 215, 79 N. E. 908.

§ 323. **Same subject — Rules applied.** — Where a small boy became a free passenger on defendant's street cars by consent of the driver in charge, it was decided that the company became bound to exercise the same care toward him as toward other passengers.<sup>14</sup> And where a boy ten years of age, riding free on the front platform of a street car with the knowledge of the conductor and driver, before reaching a place where the driver had requested him to hand in a package, jumped off the platform, fell under the car and was badly hurt, and there were rules of the company posted conspicuously forbidding passengers to use the front platform and declaring that the company would not be responsible for any accident happening thereby, in an action against the company for injuries to the boy it was held that the verdict for the plaintiff should be sustained.<sup>15</sup> If a boy ten years old wrongfully gets upon a street railway car while it is in motion, without the intention or means of paying his fare, and is not at once removed, but is wrongfully allowed by the servants of the railway company to remain there for a time, and the driver afterwards, while driving at such rate of speed as to make it dangerous for the boy to leave the car, orders him to jump off, and the boy does so, using reasonable care, and is injured, he may maintain an action against the railway company to recover damages.<sup>16</sup> But where a boy boarded a car by permission of the gripman of the car, who had no authority to grant such permission, the boy was a trespasser and not a passenger.<sup>17</sup> And the company is not liable for injuries sustained by a boy while getting upon a car by invitation of the motorman or conductor to ride in payment for his services in opening a switch for the latter, contrary to the company's rules and instructions not to allow other than passengers to ride.<sup>18</sup> It is the duty of the carrier to prevent children from entering or leaving the

**14.** *Buck v. Peoples Street Ry.*, 108 Mo. 179, 18 S. W. 1090.

**15.** *Brennan v. Fair Haven & Westville R. Co.*, 45 Conn. 284.

**16.** *Lovett v. Salem & South Dover R. Co.*, 9 Allen (Mass.) 557.

**17.** *Drogmund v. Metropolitan St. Ry. Co.*, 122 Mo. App. 154, 6 St. Ry. Rep. 21, 98 S. W. 1091.

**18.** *Finlay v. Hudson El. R. Co.*, 64 Hun (N. Y.) 373, 19 N. Y. Supp. 621, 46 St. Rep. (N. Y.) 202.

cars except under proper safeguards.<sup>19</sup> But this duty is not an absolute one; it depends upon the circumstances; for example, the company is not liable for the death of a boy seventeen years old, of ordinary intelligence, experience, and judgment, from being run over by a car while running and jumping off the front platform without permission, for the purpose of whipping the mules drawing the car, although his father had previously told the driver to keep him off the car;<sup>20</sup> nor for an injury to a boy ten years old while he was attempting to get off the front platform of a car on which he was stealing a ride and from which he had been repeatedly warned and put off by the driver, where there is no reliable evidence that the latter knew he was on the car when the accident occurred;<sup>21</sup> nor for an injury to a child who was a mere trespasser, by falling off the car, when his presence there was unknown to the driver, and, being frightened by a threat of the driver to arrest his companions, he jumped off the rear platform and was injured.<sup>22</sup> It is not liable for an injury to a boy eleven years old, who, for the purpose of stealing a ride, boards the car and secretes himself so as to avoid detection, unless his presence is actually known and assented to by the driver or conductor; and such consent cannot be implied by the mere fact that the driver observed him and did not demand any fare where it was the duty of the conductor and not the driver to collect fares.<sup>23</sup> Persons

**19.** *New Jersey Tract. v. Danbech*, 57 N. J. L. (28 Vroom) 463, 31 Atl. 1038. But employees of a street railroad company are under no obligation to keep a lookout to prevent boys endeavoring to ride without permission or paying fare from entering its cars while in motion, and owe them no duty save not to injure them wantonly. *Little Rock T. & E. Co. v. Nelson*, 66 Ark. 494, 52 S. W. 7.

**20.** *Taylor v. South Covington & C. St. R. Co.*, 14 Ky. L. Rep. 355, 20 S. W. 275.

**21.** *Wrasse v. Citizens' Tract. Co.*, 146 Pa. St. 417, 1 Pa. Adv. Rep. 125,

23 Atl. 345, 29 W. N. C. 288, 22 Pittsb. L. J. N. S. 258.

**22.** *Clutzbeher v. Union Pass. Ry. Co.*, (Pa.) 1 Atl. Rep. 597. A conductor of a street car is not bound to anticipate that a child six years old, stealing a ride on the footboard of a car, will be frightened and fall from the car at the conductor's warning to "get off," there being nothing to indicate that the conductor intended him to get off before the car stopped. *Feingold v. Phila. Tract. Co.*, 7 Pa. Dist. Rep. 445, 21 Pa. Co. Ct. 183, 4 Lack. L. News 290.

**23.** *Wynn v. Havana City & S. R.*

stealing a ride on the platform steps of a car cannot recover for the loss of a leg caused by the step coming in contact with an obstruction in the street.<sup>24</sup> Where a person got upon the running-board of a car on the opposite side to that on which the conductor was collecting fares, intending to ride a short distance and jumped from the car before the conductor reached him in the collection of fares, it was held that these were circumstances from which the jury might conclude he did not get upon the car in good faith intending to become a passenger and pay his fare.<sup>25</sup> Operating small cars by a dummy engine in a street, at a low rate of speed, with occasional stops, without directions to prevent children getting upon them, does not create a liability for the death of a child boarding the cars and being thrown or falling therefrom.<sup>26</sup> But it is negligence upon the part of the carrier to allow a young child trespassing upon a car to ride upon the steps of the front or rear platform, when his dangerous position is actually known, or when the circumstances are such as would make failure to know his peril palpable neglect and inattention to duty on the part of those in charge of the car.<sup>27</sup> And where a boy, with the intention of taking a free ride, jumped upon the running-board, which was not in use, but folded up against the side of an open trolley car, and becoming frightened by seeing the conductor approaching with outstretched arms, fell off and was injured, there can be no recovery in the absence of proof warranting a finding that the act of the conductor was improper, unnecessarily dangerous, the proximate cause of the injury, and done for the purpose of removing the plaintiff from the car.<sup>28</sup> The company is like-

Co., 91 Ga. 344, 17 S. E. 649. And see *Atchison, T. & S. F. R. Co. v. Headland*, 18 Colo. 477, 58 Am. & Eng. R. Cas. 4, 33 Pac. 185.

**24.** *Chicago, B. & Q. R. Co. v. Mehlsack*, 131 Ill. 61, 22 N. E. 812.

**25.** *Dallas Rapid Transit Co. v. Payne*, 98 Tex. 211, 3 St. Ry. Rep. 840, 82 S. W. 649.

**26.** *Jefferson v. Birmingham Ry. & E. Co.*, 116 Ala. 294, 22 So. 546,

36 L. R. A. 458. And see *Pope v. United Tract. Co.*, 30 Pittsb. L. J. N. S. 62.

**27.** *Wynn v. Havana City & S. R. Co.*, 91 Ga. 344, 17 S. E. 649; *Jackson v. St. Paul City R. Co.*, 74 Minn. 48, 5 Am. Neg. Rep. 47, 76 N. W. 956.

**28.** *Prenderville v. Coney Island & B. R. Co.*, 131 App. Div. (N. Y.) 303, 115 N. Y. Supp. 633.

wise negligent if its motorman permit a boy to play on the car and jump therefrom while it is in motion;<sup>29</sup> but, if the employees upon the car had no reasonable opportunity to prevent the boy from jumping off the platform of one car upon the opposite track, where he was run over by another car and killed, a recovery cannot be had against the company.<sup>30</sup> And where a child about six years of age, riding upon the steps of the rear platform of a street car outside of the rail erected to prevent passengers from boarding the car on that side, was thrown off by the jolting of the car and injured, it was held that although the child was of such an age as not to be guilty of contributory negligence, he was a trespasser to whom those in charge of the car did not owe the duty of discovering his peril.<sup>31</sup> And there is no liability where a boy eight years old steps off the front platform on which he was standing without the knowledge of the conductor, while the interior of the car as well as both platforms were crowded, and thus sustains injury.<sup>32</sup>

§ 324. **Liability as to newsboys.** — A newsboy who jumps on a street car without signaling it to stop, for the purpose of selling papers and jumping off again, is not a passenger, although he intended to pay fare if the conductor asked him.<sup>33</sup> A newsboy who boards a street car for the mere purpose of selling papers to the passengers and without any intention of paying his fare is a trespasser.<sup>34</sup> Newsboys entering upon street cars for the purpose of selling papers assume all the risks of ordinary negligence on the part of the company's servants; they are not passengers and may be compelled to leave the car to facilitate the admission of

29. *Pueblo El. St. R. Co. v. Sherman*, 25 Colo. 114, 53 Pac. 322.

30. *Hogan v. Central Park, N. & E. River R. Co.*, 124 N. Y. 647, 36 St. Rep. (N. Y.) 352, 26 N. E. 950.

31. *Quehan v. City of Covington & Cincinnati St. Ry. Co.*, 25 Ky. L. Rep. 1920, 2 St. Ry. Rep. 312, 78 S. W. 1106.

32. *Sandford v. Hestonville, etc.*,

*R. Co.*, 136 Pa. St. 84, 20 Atl. 799, 26 W. N. C. 401, 48 Phila. Leg. Int. 67.

33. *Raming v. Metropolitan St. Ry. Co.*, 157 Mo. 477, 57 S. W. 268.

34. *Massell v. Boston Elevated Ry.*, 191 Mass. 491, 78 N. E. 108; *Barry v. Union Ry. Co.*, 105 App. Div. (N. Y.) 520, 4 St. Ry. Rep. 835, 94 N. Y. Supp. 441.

passengers,<sup>35</sup> and the company is not liable for the act of a motorman, having no control over or authority to interfere with passengers or persons in the car, in pushing a newsboy off the car, who was getting on to sell a paper to a passenger.<sup>36</sup> A rule that a street railway company is, as a matter of law, responsible for any wilful and malicious injury inflicted upon a passenger by the conductor or any other person employed by it, does not apply where a newsboy who goes on the front platform of a moving street car for the purpose of selling his papers to the passengers standing thereon and is shoved by the motorman of the car into the street.<sup>37</sup> Where a street railway company permitted newsboys to come upon its cars, upon signals from its passengers, to sell and deliver papers to them, the conductor had the right to compel such a boy to get off the car while running at the rate of four or five miles an hour, provided it was safe for the boy to alight; and whether it was safe or not was a question of fact for the jury. But if the boy could not get off without risk of injury, then the order was unreasonable, and, if unreasonable, unlawful; and the order to leave, enforced by the threatening manner and perhaps menacing tone of voice of the conductor, was as effective as the application of physical force, and the wrongful expulsion of the plaintiff from the car while in motion was the proximate and sole cause of the accident and injury.<sup>38</sup> A newsboy who has jumped on the left side of an open car, where an adjustable bar is in place, is a trespasser, and the company and its servants owe him no other duty than to refrain from wilfully or recklessly and wantonly exposing him to injury. The fact that the conductor, being on the opposite

**35.** *Philadelphia Traction Co. v. Orbann*, 119 Pa. St. 37, 12 Atl. 816. It is a part of the duty of a street car driver to keep trespassers off his car, and therefore, where he compels a boy who has entered it to sell a paper to a passenger, to jump off while the car is in rapid motion, such act, though wanton and reckless, is within the scope of his employment and renders the company liable. *Bar-*

*ber v. Broadway & S. A. R. Co.*, 10 Misc. Rep. (N. Y.) 109, 61 St. Rep. (N. Y.) 466, 30 N. Y. Supp. 931.

**36.** *Coll v. Toronto R. Co.*, (Can.) 25 Ont. App. 55.

**37.** *Barry v. Union Ry. Co.*, 105 App. Div. (N. Y.) 520, 4 St. Ry. Rep. 835, 94 N. Y. Supp. 441, 449.

**38.** *Indianapolis St. Ry. Co. v. Hockett*, 161 Ind. 196, 1 St. Ry. Rep. 115, and notes 67 N. E. 106.

side of the car, motioned the plaintiff to get off while the car was moving rapidly did not constitute wilful or reckless conduct.<sup>39</sup>

**39.** *Lebov v. Consolidated Ry. Co.*, 203 Mass. 380, 6 St. Ry. Rep. 430, 89 N. E. 546. In this case the court reviews Massachusetts decisions in the following language: "The plaintiff in the first-named case, hereinafter called the plaintiff, was a trespasser upon the defendant's car, and the defendant and its servants owed him no other duty than to refrain from wilfully or recklessly and wantonly exposing him to injury. *Albert v. Boston Elev. Ry. Co.*, 2 St. Ry. Rep. 448, 185 Mass. 210, 70 N. E. 52, and cases cited; *Massell v. Boston Elev. Ry. Co.*, 191 Mass. 491, 78 N. E. 108; *McManus v. Thing*, 194 Mass. 362, 80 N. E. 487. Those of our decisions which are relied on by the plaintiff are not at variance with this rule. In *Lovett v. Salem & South Danvers R. Co.*, 9 Allen 557, there was evidence that the conductor, so far as he could do so, had accepted the plaintiff and his companion as passengers by telling them to go on the front of the car. The plaintiff also testified that he saw the driver, who stood by him on the front platform, move his hand, and thought that he felt the driver's hand or foot when the latter told him to get off; and this would tend to show an assault which might constitute wanton or reckless conduct of the driver. *KNOWLTON, C. J.*, in *Bjornquist v. Boston & Albany R. Co.*, 185 Mass. 130, 132, 70 N. E. 53, 102 Am. St. Rep. 332. In *Murphy v. Union Ry.*, 118 Mass. 228, the plaintiff was not a trespasser, but a passenger, although by reason of his offensive condition the conductor had a right to

remove him from the car. *Vinto v. Middlesex R. Co.*, 11 Allen 304, 87 Am. Dec. 714. In *Hudson v. Lynn & Boston R. Co.*, 178 Mass. 64, 59 N. E. 647, and *Hudson v. Lynn & Boston R. Co.*, 3 St. Ry. Rep. 394, 185 Mass. 510, 71 N. E. 66, a recovery was allowed only for the actual assault committed upon the plaintiff's intestate. In *McKeon v. N. Y., N. H. & H. R. Co.*, 183 Mass. 271, 67 N. E. 329, 97 Am. St. Rep. 437, the defendant was held merely for the reckless act of its brakeman in pushing the plaintiff off its car while the train was moving "pretty fast." So in *Rounds v. Delaware, Lackawanna & Western R. Co.*, 64 N. Y. 129, 21 Am. Rep. 597, the plaintiff was kicked from the car by the defendant's servant. In *Aiken v. Holyoke St. Ry.*, 2 St. Ry. Rep. 416, 184 Mass. 269, 68 N. E. 238, the ground of recovery was the wanton and reckless act of the defendant's motorman in suddenly starting his car at full speed around a curve, while he knew that the plaintiff, a boy less than seven years of age, was standing in a dangerous position upon the step and crying to the motorman to let him off. *Foley v. West End St. Ry.*, 195 Mass. 332, 81 N. E. 189, turned on the point that the jury might believe the plaintiff's testimony, and so find that he was not a trespasser on the defendant's car, and did not voluntarily jump off in order to avoid the conductor. But that is exactly what this plaintiff did do. \* \* \*

On these facts, the plaintiff's contention cannot be sustained. His position upon the car, standing upon

But where a newsboy, nine years of age, was riding on the lower step on the outside of the iron guard next to the track for west-

the running-board where by reason of the bar he could not enter the car and was liable, as he stood with his papers under his arm, to be hit and hurt by cars that might pass upon the other track, was dangerous, and one that the conductor ought not allow him to occupy. Moreover, he ought not have been upon the car at all. The conductor's duty to the company, as well as a proper concern for the plaintiff's own safety, required him to see that the plaintiff did not remain there. The language of the present chief justice in *Bjornquist v. Boston & Albany R. Co.*, 185 Mass. 130, 132, 133, 134, 70 N. E. 53, 102 Am. St. Rep. 332, is peculiarly applicable here. Nor did this conductor use language even as violent as was testified to in that case and held to be insufficient to justify a finding of wilful and wanton conduct. Indeed, upon the vital question involved, this case is much stronger for the defendant than was that one. It was expressly found there, as upon the testimony is claimed to have been the case here, that the car was moving at a dangerous rate of speed for the plaintiff. There was nothing to show that the conductor's gesture testified to was anything more than a waving of his hand. We see nothing in his conduct which justified on the part of the plaintiff a reasonable apprehension of violence, or any other fear than that which arose from his manifest consciousness of his own wrongdoing. *Planz v. Boston & Albany R. Co.*, 157 Mass. 377, 381, 32 N. E. 356, 17 L. R. A. 835.

In *Albert v. Boston Elev. Ry.*,

2 St. Ry. Rep. 448, 185 Mass. 210, 70 N. E. 52, the language and conduct of the conductor were very similar to those here testified to. There as here the conductor was at some distance from the plaintiff. Here as there it cannot be said that he had reason to expect that his command would cause the plaintiff serious injury. The only substantial difference between the cases is that there it did not appear that the speed of the car was increased or diminished after the plaintiff's attempt to get on and before the happening of the accident. But the natural and gradual increase of speed after starting within such limits as were here testified to was treated as an immaterial circumstance in *Planz v. Boston & Albany R. Co.*, 157 Mass. 377, 380, 32 N. E. 356, 17 L. R. A. 835.

The plaintiff in the case of *Mugford v. Boston & Maine R. Co.*, 173 Mass. 10, 52 N. E. 1078, was about two years younger than the plaintiff. He was ordered by a brakeman to get off a freight train which, according to some of the evidence, was going at the rate of eight miles an hour. The highest rate of speed testified to in the case at bar was seven to eight miles an hour. The brakeman in that case was as near to the plaintiff, and his gestures were as threatening, as was testified to of the conductor in this case; but that plaintiff was not allowed to recover.

In our opinion, these cases must be governed by the rule laid down in *Albert v. Boston Elev. Ry. Co.*, 2 St. Ry. Rep. 448, 185 Mass. 210, 70 N. E. 52, and *Massell v. Boston Elev.*

bound cars, the car on which he was riding was going east, and the evidence tended to show that the conductor approached him in a threatening manner and directed him to jump off, and the car at the time was traveling at the rate of eighteen or twenty miles per hour, when in response to the threatening attitude of the conductor the newsboy jumped and fell upon the west-bound track and was so stunned that he was unable to reach a place of safety before the approach of a car upon such track and he was struck and instantly killed, it was held that the case was properly submitted to the jury, and that if the testimony as to the conduct of the conductor was believed by the jury it was sufficient to sustain a verdict.<sup>40</sup> And where a conductor of a street railway car, without notice and without warning to a newsboy to get off the car, violently throws him to the ground and another car, moving in the opposite direction, runs over him and injures him severely, the street railway company is liable.<sup>41</sup> Where a newsboy, a trespasser upon a car, was injured, it was held that evidence that other conductors and motormen had allowed the plaintiff to get upon their cars was properly excluded in the absence of evidence that the defendant or its officers knew the fact and acquiesced in the violation of the rules.<sup>42</sup>

§ 325. **Liability for failure to carry passenger.** — If a street railroad company undertakes with a passenger, who pays his fare, to convey him with reasonable speed to his destination, and the car breaks down on the way, and the company refuses to transfer him to another car without payment of another fare, his cause of action for resulting damages at once arises, and he cannot, by attempting to transfer himself to another car, and resisting his

Ry. Co., 191 Mass. 491, 78 N. E. 108. See also *Anternoitz v. N. Y., N. H. & H. R. Co.*, 193 Mass. 542, 79 N. E. 789; *Leonard v. Boston & Albany R. Co.*, 170 Mass. 318, 49 N. E. 621; *Sullivan v. Boston Elev. Ry. Co.*, 199 Mass. 73, 76, 84 N. E. 844. *Per* SHELDON, J.

40. *Chicago City Ry. Co. v. O'Donnel*, 207 Ill. 478, 2 St. Ry. Rep. 147, 69 N. E. 882.

41. *North Chicago City Ry. Co. v. Gastka*, 27 Ill. App. 518.

42. *Massell v. Boston Elev. Ry. Co.*, 191 Mass. 491, 5 St. Ry. Rep. 450, 78 N. E. 108.

expulsion therefrom by the conductor, in accordance with the company's rules, subject the company to any further liability.<sup>43</sup> The rule is the same in case of the refusal of the conductor to accept a proper transfer ticket, or when from any other cause, for which the carrier may be held liable, injury has been sustained by the passenger. When the conductor in charge of the car has refused to accept the ticket offered and tells him that he must pay fare or leave the car, the passenger then knows that he cannot proceed upon the ticket offered, but must resort to his remedy the same as though he had been ejected. If, after this notice, he waits for the application of force to remove him, he does so in his own wrong; he invites the use of the force necessary to remove him; and if no more is applied than is necessary to effect the object, he can neither recover against the conductor nor the company therefor. This is the rule deducible from the analogies of the law. No one has a right to resort to force to compel the performance of a contract made with him by another. He must avail himself of the remedies the law provides in such case. This rule will prevent breaches of the peace instead of producing them; it will leave the company responsible for the wrong done by its servants without aggravating it by a liability to pay thousands of dollars for injuries received by an assault and battery, caused by the faithful effort of its servants to enforce its lawful regulations.<sup>44</sup> In an action against the carrier to recover damages for failure to carry plaintiff within the appointed time to the place for which he had taken passage, the damages to be recovered must be the natural and proximate consequence of the act com-

**43.** *Taylor v. Nassau Elec. R. Co.*, 32 App. Div. (N. Y.) 486, 53 N. Y. Supp. 5.

**44.** *Townsend v. N. Y. Cent., etc., R. Co.*, 56 N. Y. 295, 301. One who, after being informed by the conductor of a street car that his car does not pass her home, boards the car, cannot recover from the street car company for breach of a contract

to carry her to such point, on the ground that she was informed by another employee, whose sole duties and authority were to take the register of the cars as they came in and to signal conductors when to start out and send and receive telephone messages, that such car passed her residence. *Dillon v. Lindell R. Co.*, 71 Mo. App. 631.

plained of.<sup>45</sup> And where a person having a round-trip ticket stood at a station waiting for the car, and the employees though given the proper signal failed to stop the car, and by reason thereof he failed to keep an engagement and was compelled to walk to the next station, a distance of three miles, it was held that a case was made out which warranted an instruction on exemplary damages.<sup>46</sup>

**§ 326. Passenger carried past destination.** — Where a passenger is carried past his destination as a result of his own neglect or carelessness, the company is under no obligation to furnish him free return passage. Thus it was so held where a person boarded an elevated railroad train, was asleep until after his station was passed, and remained aboard until the end of the line was reached when he attempted to board a return train without paying any fare, and the company's employees resorted to force to prevent his boarding such train. An action for assault was brought and a judgment rendered for the plaintiff, which was reversed on appeal, it being held as above stated and declared that at the time of the alleged assault the relation of carrier and passenger had ceased.<sup>47</sup> So where a passenger who was carried beyond his destination contended that he had a right to stay on the car, without paying an extra fare, until on the return trip it reached the point at which he wished to alight, the following charge was held not to be erroneous: "If the conductor carrying the defendant took him beyond his stopping place, he (defendant) would not have the right to go to the end of the line and come back to his stopping place, but his damage and his wrong would arise, if there was such, as soon as he was carried by his stopping place, and his remedy would be to bring suit either against the company,

**45.** *Knight v. Wilcox*, 14 N. Y. 413; revg. 18 Barb. (N. Y.) 212; *Medbury v. New York & Erie R. Co.*, 26 N. Y. 564; *Benson v. New Jersey R. & T. Co.*, 22 N. Y. Super. Ct. (9 Bosw.) 412.

**46.** *Northern Texas Trac. Co. v.*

*Peterman*, (Tex. Civ. App.) 3 St. Ry. Rep. 851, 80 S. W. 535.

**47.** *Brown v. Interborough Rapid Transit Co.*, 56 Misc. Rep. (N. Y.) 637, 6 St. Ry. Rep. 854, 107 N. Y. Supp. 629.

the owner of the car in charge of the conductor, or against the conductor himself for such damage as he may have sustained.”<sup>48</sup> The decided weight of authority is to the effect that, when one is carried beyond his destination, or stopped short of it, and is directed by the conductor to alight, and being ignorant of the surroundings and dangers that might befall him, while attempting to get to his station with or without the directions of the person in charge of the car, receives injuries while exercising ordinary care for his own safety, the company is responsible to him in damages. In such a case the company has not performed its contract, and, in fact, he is still a passenger until he reaches the station, and the injury received is the proximate result of the wrong done him.<sup>49</sup> So where a passenger was carried past the place at which he requested the conductor to let him off to a place where it was dangerous for him to alight and attempt to walk back, at which the conductor directed him to leave the car and walk back, without warning him of any danger, and on account of the darkness the plaintiff fell through a bridge and was injured, the negligence of the conductor was held to be the proximate cause of the injury.<sup>50</sup> And where a passenger, on a dark night, signaled the conductor to put her off at a particular street crossing, but he put her off at a place beyond such crossing, where the track was very rough, and while attempting to cross the track to go to her home she fell and was injured, the negligence of the company was held to be actionable, entitling the plaintiff to recover unless she was guilty of contributory negligence.<sup>51</sup> And in an action by a passenger for injuries, an allegation by the defendant that the plaintiff assumed the risk by voluntarily alighting from the car of the defendant between stations, with knowledge of the fact, and with an appreciation of the danger, was unsupported where the evidence showed that the plaintiff, with the assistance of the

**48.** *Powell v. Wiley*, 125 Ga. 823, 5 St. Ry. Rep. 155, 54 S. E. 732.

**49.** *Kentucky & I. Bridge & R. Co. v. Buckler*, 125 Ky. 24, 30 Ky. L. Rep. 1086, 5 St. Ry. Rep. 324, 100 S. W. 328.

**50.** *Indianapolis & E. Ry. Co. v. Barnes*, 35 Ind. App. 485, 4 St. Ry. Rep. 220, 74 N. E. 583.

**51.** *Melton v. Birmingham Ry., Light & P. Co.*, 153 Ala. 95, 6 St. Ry. Rep. 210, 45 So. 151.

conductor, alighted from the car and was on the ground before she was aware of the fact that the car was beyond her destination.<sup>52</sup> Where a person who was a stranger in a city notified the conductor that she wished to be put off at a certain street, which the latter agreed to do, but failed to put her off at a point beyond her destination, it was held that such agreement constituted a contract and a recovery by the plaintiff of damages for illness resulting from exposure in attempting to find her way back was affirmed.<sup>53</sup>

**§ 327. Where compelled to transfer — Car ahead.** — Where a street car has a sign thereon indicating that it will carry passengers to a certain terminus, there arises an implied contract with passengers who board such car that it will carry them to that terminus if they so desire. And in such a case if those in charge of the car have knowledge of the fact that the car will not go to the point indicated, it is their duty to notify passengers boarding the car of that fact. This does not, however, necessarily mean that in all cases the passenger will be carried the entire distance upon the one car, for the rule is subject to the limitation that though a car may have such a sign yet it may be the usual course of business for the company to give a transfer at a point on the line to another car in order to enable passengers to reach such terminus. Again, a reasonable necessity due to the exigencies naturally attendant upon the conduct of the street car business may arise for the transfer of a passenger from one car to another, which necessity is not known to the conductor or the motorman of the car boarded by the passenger at the time of taking passage. In either of these cases a transfer may be without liability to the passenger transferred. In the latter case reasonable necessity must be determined upon the facts and circumstances of each particular case.<sup>54</sup>

**52.** *Melton v. Birmingham Ry., Light & P. Co.*, 153 Ala. 95, 6 St. Ry. Rep. 210, 45 So. 151.      666, 5 St. Ry. Rep. 648, 100 S. W. 1111.

**53.** *Henderson v. Metropolitan Street Railway Co.*, 123 Mo. App.      **54.** *Burrow v. Norfolk Ry. & Light Co.*, 5 St. Ry. Rep. 851, 12 Va. Law Reg. 763.

The fact that a passenger is transferred enroute to a car ahead in order to make up schedule time, is held to constitute no actionable breach of the carrier's contract. Thus it was so held where it appeared that the car on which plaintiff was a passenger was switched en route to another track and plaintiff was tendered a transfer to another car at hand ready to carry him to his destination which he refused, and refused to change cars, stating that if he had known the car was not going to his destination as indicated by the sign thereon he would have taken passage on another car.<sup>55</sup>

**55.** *Dyden v. St. Louis Transit Co.*, 120 Mo. App. 424, 6 St. Ry. Rep. 861, 96 S. W. 1044. The first count of plaintiff's complaint was based on an alleged breach of contract to carry him to his destination. The second count or paragraph was predicated upon section 1760*d* of the city ordinance (city of St. Louis), No. 21,113, which read as follows: "Except in case of unavoidable accident or when a car is about to turn in accordance to a schedule at a car shed, or where extra cars are required to run temporarily under exceptional circumstances to a particular point for the accommodation of the public and are plainly placarded to the effect, every street car company or association operating, managing, controlling, or running any line of cars, shall be required to run each of its cars that may be carrying one or more passengers to the end of the entire route, and shall not require any passenger to alight from any one of its cars and take a preceding or succeeding car traveling over the same route in order to continue to his or her destination. This section shall not be so construed to prohibit the reasonable transfer of passengers from one line to another, or from one division to

another, at any reasonable point from which said lines or divisions do not continue on the same route; but no such company or association shall under any existing charter or franchise establish any new route or routes which require the transfer of passengers to another car in order to reach any point accessible without a transfer on August twenty-eighth, nineteen hundred and two, and all routes as then operated shall continue to be operated without abridgment. Provided that in case of emergency, such as the blocking of the tracks caused by conflagrations or under similar exigencies, the cars may, in order to accommodate public convenience, temporarily be run over other tracks until the regular route can again be covered; and provided further that such companies or associations may make all lawful changes in the routes when public convenience requires, on condition that the proposed changes first received the written approval and sanction of the mayor, president of the council, and street railway supervisor." By another section of the ordinance, a violation of section 1760*d* was made a misdemeanor, punishable by a fine of not less than \$5 or more than \$500

**§ 328. Assault upon passenger by employee.** — It has been steadily held by the courts to be the duty of a carrier of passengers to protect them, in so far as this can be done by the exercise of a high degree of care, from the violence and insults of other passengers and strangers, and to protect them from the violence and insults of the carrier's own servants; and the inquiry whether this duty arises from contract or from the nature of the employment

"for each and every offense for every day during which any unlawful order or schedule remains unrevoked."

Considering the second count in the complaint, the court said: "Waiving a discussion of the question as to whether or not a violation of the ordinance gave a right of action to a private individual, we think the evidence falls short of showing a violation of the ordinance on the occasion complained of. The ordinance, in effect, legalized the defendant's routing of its cars as it existed on August 28, 1902, and provided that no change of the routing should be thereafter made without the sanction in writing of the mayor, the president of the council, and the supervisor of street railways, and provided, in effect, that a car should not be turned from its established routing, except in cases of unavoidable accident, or when it was about to be turned in according to schedule at a car shed. The ordinance does not attempt to take away from the company its lawful right to make all reasonable rules and regulations for the conducting of its business, nor to specialize all and every circumstance under which a car might be temporarily turned from its regular route. As shown by the evidence, it was necessary to turn the car, on which plaintiff was a passenger, from its regular route, for the purpose of making up time that had

been unavoidably lost, to restore it to its schedule time, and to give it the usual space ahead of the car that was following. We think this was not only a reasonable diversion, but a necessary one, for the accommodation of the traveling public, and was in no sense a violation of the letter or spirit of the ordinance relied upon, and hence afforded the plaintiff no right of action; and we conclude that plaintiff's evidence failed to establish a right of action on either count of the complaint, and affirm the judgment."

*Georgia.* — Savannah Electric Co. v. Wheeler, 128 Ga. 550, 5 St. Ry. Rep. 533, 58 S. E. 38; Savannah St. R. Co. v. Bryan, 86 Ga. 312, 12 S. E. 307.

*Illinois.* — Railway Co. v. Rector, 104 Ill. 296; Chicago & E. R. Co. v. Flexman, 103 Ill. 546, 42 Am. Rep. 33.

*Indiana.* — Citizens' St. R. Co. v. Clark, 33 Ind. App. 190, 3 St. Ry. Rep. 232, 71 N. E. 53.

*Iowa.* — McKinley v. Chicago, etc., Ry. Co., 44 Iowa 314, 24 Am. Rep. 748.

*Kentucky.* — Winnegan v. Central Pass. Ry. Co., 85 Ky. 547, 4 S. W. 237; Sherley v. Billings, 8 Bush 147, 8 Am. Rep. 451.

*Maine.* — Hanson v. European & N. A. Ry. Co., 62 Me. 84, 16 Am. Rep. 404; Goddard v. Grand Trunk Ry.

becomes unimportant, except that the duty goes with the carrier's contract, however made, whereby the relation of carrier and passenger is established.<sup>56</sup> A common carrier is liable to any one sustaining the relation of passenger to it for an injury resulting

Co., 57 Me. 202, 2 Am. Rep. 39, where a conductor assaulted a passenger on demanding his ticket.

**56. Massachusetts.** — *Bryant v. Rich*, 106 Mass. 180, 8 Am. Rep. 311; *Ramsden v. Boston & A. R. Co.*, 104 Mass. 120, 6 Am. Rep. 200.

*Michigan.* — *Foster v. Grand Rapids R. Co.*, 140 Mich. 689, 104 N. W. 380, 18 Am. Neg. Rep. 479.

*Minnesota.* — *Ford v. Minneapolis St. Ry. Co.*, 98 Minn. 96, 4 St. Ry. Rep. 525, 107 N. W. 817; *Dean v. St. Paul Union Depot Co.*, 41 Minn. 360, 16 Am. St. Rep. 703.

*Missouri.* — *O'Donnell v. St. Louis Transit Co.*, 107 Mo. App. 34, 3 St. Ry. Rep. 568, 90 S. W. 315; *Strauss v. St. Louis Transit Co.*, 102 Mo. App. 644, 77 S. W. 156.

*Nebraska.* — *Haman v. Omaha Horse Ry. Co.*, 35 Neb. 74, 52 N. W. 830.

*New York.* — *Nowack v. Metropolitan St. Ry. Co.*, 166 N. Y. 433, 60 N. E. 32; *Palmeri v. Manhattan Ry. Co.*, 133 N. Y. 266, 30 N. E. 1001; *Mulligan v. New York & R. B. R. Co.*, 129 N. Y. 512, 29 N. E. 952; *Carpenter v. Boston, etc., R. Co.*, 97 N. Y. 500; *Stewart v. Brooklyn, etc., R. Co.*, 90 N. Y. 588, 43 Am. Rep. 685; *Schwartzman v. Brooklyn Heights R. Co.*, 84 App. Div. 608, 82 N. Y. Supp. 890; *Willis v. Metropolitan St. Ry. Co.*, 76 App. Div. 340, 78 N. Y. Supp. 478; *Baumstein v. New York City Ry. Co.*, 107 N. Y. Supp. 23, 6 St. Ry. Rep. 725.

*Ohio.* — *Passengers R. Co. v.*

*Young*, 21 Ohio St. 518, 8 Am. Rep. 78.

*Texas.* — *Dillingham v. Anthony*, 73 Tex. 47, 15 Am. St. Rep. 757.

*Washington.* — *Cunningham v. Seattle Elec. R. Co.*, 3 Wash. 471.

*Wisconsin.* — *Craker v. Chicago, etc., Ry. Co.*, 36 Wis. 657, 17 Am. Rep. 504, where a railway conductor kissed a female passenger against her will.

As to assaults on passengers by employees, see *Moore on Carriers*, pp. 631 *et seq.*

**Question of negligence of motorman one for jury** on evidence that boy was standing on step and that motorman saw him and shook the door causing him to fall, which evidence was denied by the motorman. *Saxton v. Pittsburg Rys. Co.*, 219 Pa. St. 492, 6 St. Ry. Rep. 734, 68 Atl. 1022.

**Bill of particulars; particulars which plaintiff may be required to give in action against street railway for assault by its servant.** — In the case of *Ferris v. Brooklyn Heights R. Co.*, 116 App. Div. 892, 6 St. Ry. Rep. 729, 102 N. Y. Supp. 463, it was held, in an action against a street railway for an assault by its servant, where the complaint simply alleged that the assault took place on a certain day on a specified line on a specified street, that:

1. Such allegation was "indefinite to the extent that it left the defendant in the dark as to the day, the

from any acts of its servants or employees, whether wilful and malicious or not, and even though such acts are not done in the course or within the scope of the servants' or agents' employment; the rule that the master is not liable for injury resulting from the wilful and malicious acts of his agents, not done within the scope of their employment, is not applicable when the injury is inflicted upon a passenger by the carrier's agents or servants. The carrier is liable in such cases because the act is violative of the duty it owes through the servant to the passenger, and not upon the idea that the act is incident to a duty within the scope of the servant's employment; and it is manifestly immaterial that the act may have been of private retribution on the part of the servant, actuated by personal malice toward the passenger and having no

time of day, the car, or the servants, and required a minute, searching, and laborious investigation by the defendant before it could throw any light upon the alleged occurrence."

2. Plaintiff should be required to give bill of particulars naming the exact place, time of day, and also the direction in which the car was going. Citing *Kerch v. Rome, Watertown & Ogdensburg R. Co.*, 14 St. Rep. (N. Y.) 446.

3. He should also be required to give the number of the car, the line, and the badge number of the motor-man and conductor, if he knew those items. Citing *Shepard v. Wood*, 116 App. Div. (N. Y.) 861, in which the court said in discrimination: "This is not like the case of a street car accident, where the company may require the hour of the day in order to identify the car out of many cars."

4. If plaintiff knew the names of the servants he could be required to give them. Citing *Causullo v. Lenox Construction Co.*, 106 App. Div. (N. Y.) 575, 576.

5. He should not be required to

give an exact statement of the injuries sustained or the nature, extent, or effect of the same when there is no allegation of permanent injuries. Citing *English v. Westchester Electric R. Co.*, 69 App. Div. (N. Y.) 576; *Steinau v. Metropolitan St. R. Co.*, 63 App. Div. (N. Y.) 126.

6. "The requirements of a setting forth of the length of time the plaintiff was confined to bed and house, the amounts paid for doctor's bills and medicines, the nature of his business, average earnings, and the time of his detention from work, are proper. (*Steinau v. Metropolitan St. R. Co.*, *supra*; *O'Neill v. Interurban St. R. Co.*, 87 App. Div. (N. Y.) 556; *Ziadi v. Interurban St. R. Co.*, 97 App. Div. (N. Y.) 137, and cases cited.)"

7. "If the plaintiff should be unable to furnish any of this information, or to furnish it completely, he should be directed to state such lack of knowledge or inability as a substitute for the information requested by the demand. (*Schwartz v. Green*, 38 N. Y. St. Rep. 569.)"

attribute of service to the carrier in it.<sup>57</sup> The servants of common carriers in charge of their passenger cars are bound to use the utmost care in protecting the passengers. Though a passenger is unreasonable or discourteous in his contentions, it does not

**57.** Birmingham Ry. & Elec. R. Co. v. Baird, 130 Ala. 334, 30 So. 456, 54 L. R. A. 752; Central of Ga. Ry. Co. v. Brown, 113 Ga. 414, 38 S. E. 989, 84 Am. St. Rep. 250, adopting the doctrine that a carrier is liable for the torts of its servants, committed in the course of the servants' employment, even though the tort be a wilful one; Southern Ry. Co. v. Wildman, 119 Ala. 565, 24 So. 764; Hanson v. Urbana & Co. El. St. Ry. Co., 75 Ill. App. 474; Goddard v. Grand Trunk Ry. Co., 57 Me. 202; Ramsden v. Boston & A. R. Co., 104 Mass. 117, 6 Am. Rep. 200; Dwinelle v. New York Cent. & H. R. R. Co., 120 N. Y. 117, 8 L. R. A. 224, 24 N. E. 319, holding that whatever may be the motive which incites the servant to commit an unlawful or improper act toward a passenger during the existence of the relation of carrier and passenger, the carrier is liable for the act, and its natural and legitimate consequences; Stewart v. Brooklyn & C. T. R. Co., 90 N. Y. 588; Knoxville Trac. Co. v. Lane, 103 Tenn. 376, 53 S. W. 557; Texas & P. Ry. Co. v. Tott, 20 Tex. Civ. App. 335, 50 S. W. 193; Masterson v. Chicago & N. W. Ry. Co., 102 Wis. 571, 78 N. E. 757; Hart v. Met. St. Ry. Co., 34 Misc. Rep. (N. Y.) 531, 69 N. Y. Supp. 906; Rose v. Railroad Co., 106 N. C. 170, 11 S. E. 526; La Fitte v. Railroad Co., 43 La. Ann. 348 So. 701; Birmingham Ry. & Elec. Co. v. Mason, 1 St. Ry. Rep. 1, 137 Ala. 342, 34 So. 207, 237, 342.

But the company is not liable for an assault committed by a motorman upon a passenger after he alighted from the car. Hanson v. Urbana & C. El. St. Ry. Co., *supra*; Passenger Ry. Co. v. Young, 21 Ohio St. 518, 8 Am. Rep. 78, where a brakeman unlawfully ejected a passenger by the conductor's orders.

**Action for assault.** — Where the complaint in an action for assault by the carrier's employee alleged that the plaintiff wilfully and maliciously insulted, assaulted, beaten, and bruised, by defendant's street railway company while a passenger on its line, but did not allege negligence on the part of defendant or a failure to perform its contract, the cause of action was one for assault and battery and not within the jurisdiction of the Municipal Court under the Greater New York Charter, section 1364 thereof providing that such court shall not have jurisdiction of an action for damages for assault and battery. Fister v. Met. St. Ry. Co., 30 Misc. Rep. (N. Y.) 430, 62 N. Y. Supp. 467; Chicago, etc., Ry. Co. v. Dickson, 63 Ill. 151, 14 Am. Rep. 114; Nashville, etc., R. Co. v. Starnes, 9 Heisk. (Tenn.) 52, 24 Am. Rep. 296, where an engineer maliciously sounded a locomotive whistle; Shea v. Sixth Ave. R. Co., 62 N. Y. 180, 20 Am. Rep. 480, where a street car driver threw one off the platform who had stepped on it to cross the street.

justify an assault upon him or his ejection from the car.<sup>58</sup> An unjustifiable assault upon a passenger by a railroad employee, who owes him the duty of protection, renders the carrier responsible for the injuries caused thereby;<sup>59</sup> and it matters not that the act of the employee was malicious and wanton, if done in the course of the discharge of his duties to his employer, which relate to the passenger.<sup>60</sup> If it be shown that the act was previously author-

**58.** *Frankfort & Versailles Tr. Co. v. Marshall*, 30 Ky. L. Rep. 431, 6 St. Ry. Rep. 726, 98 S. W. 1035.

**59.** *Achison, T. & S. F. R. Co. v. Henry*, 55 Kan. 715, 29 L. R. A. 465, 2 Am. & Eng. R. Cas. N. S. 418, 41 Pac. 952; *Franklin v. Third Ave. R. Co.*, 52 App. Div. (N. Y.) 512, 65 N. Y. Supp. (99 St. Rep.) 434; *Stewart v. Brooklyn & Crosstown R. Co.*, 90 N. Y. 588; *St. Louis S. W. Ry. Co. of Texas v. Johnson*, (Tex.) 68 S. W. 58; *Johnson v. Detroit, Y. & A. A. Ry. Co.*, 130 Mich. 453, 90 N. W. 274, 9 Detroit Leg. N. 123; *Clerc v. Morgan's L. & T. R. Co.*, 107 La. 370, 31 So. 886.

**60.** *Eads v. Met. Ry. Co.*, 43 Mo. App. 536; *Fordyce v. Beecher*, (Tex.) 21 S. W. 179; *Tanger v. Southwest Mo. El. Ry. Co.*, 85 Mo. App. 28; *Lexington Ry. Co. v. Cozine*, (Ky.) 64 S. W. 848; *Lyons v. Broadway & S. A. R. Co.*, 32 St. Rep. (N. Y.) 232, 10 N. Y. Supp. 237; *Moritz v. Interurban St. Ry. Co.*, 84 N. Y. Supp. 162, holding that where the evidence showed that as plaintiff stepped on the car, the motorman, without cause, struck him violently, saying "You get off," the carrier was liable for injuries sustained by the passenger, since it is liable for the acts of injury of an employee, although in departure from the authority conferred or implied, if they

occur in the course of the employment; *Pinder v. Brooklyn Heights R. Co.*, 65 App. Div. (N. Y.) 521, 72 N. Y. Supp. 1082; *affd.*, 173 N. Y. 519, 66 N. E. 405, holding that where plaintiff, a bright boy fourteen years old, was kicked off the front platform of a street car by the motorman, and fell, screaming, on his back; he got up and walked slowly and lame across the other track, when he was struck by a car coming from the opposite direction, and received injuries causing his death, it was error to nonsuit plaintiff, as the question of whether he was in the exercise of ordinary care under the circumstances was for the jury; *Central of Ga. Ry. Co. v. Brown*, 113 Ga. 414, 38 S. E. 989; *Nowack v. Metropolitan St. Ry. Co.*, 166 N. Y. 433, 440, 60 N. E. 32; *Palmeri v. Manhattan Ry. Co.*, 133 N. Y. 261, 30 N. E. 100; *Ranger v. Great Western Ry. Co.*, 5 H. L. Cas. 86, 87; *Stewart v. Brooklyn & Cross-town R. Co.*, 90 N. Y. 588, in which the court in its opinion said: "A rule which should make the carrier liable when the act resulting in the injury was carelessly, but unintentionally, done, and exonerate him when the injury was the result of the intentional act of the servant, would lead to most absurd results. By such a rule a stage company who should place a lady passenger under

ized or subsequently ratified by the master, or that the latter participated in the wrong, it may be chargeable with punitive damages, and not otherwise.<sup>61</sup> The weight of authority holds that a

the protection of its driver, to be carried over its route, would be liable if, by his unskilful driving, he upset the coach and injured her; but if, taking advantage of his opportunity, he should assault and rob her, the carrier would go scot free. If the porter of a sleeping car, employed to guard the car while the passengers sleep, should himself fall asleep or, abandoning his post, allow a pick-pocket to enter and rob the passengers, the company would be liable; but if the guardian should himself turn pickpocket, and rifle the pockets of the passengers, the company would not be responsible for his acts. The carrier selects his own servants and agents, and we think he must be held to warrant that they are trustworthy as well as skilful and competent." *Johnson v. Detroit, Y. & A. A. Ry. Co.*, 130 Mich. 453, 90 N. W. 274.

The contrary doctrine of *Isaacs v. Third Ave. R. Co.*, 47 N. Y. 122, 7 Am. Rep. 418, has been substantially overruled; *Rounds v. Delaware, etc., R. Co.*, 64 N. Y. 120, 21 Am. Rep. 597; *Shea v. Sixth Ave. R. Co.*, 62 N. Y. 180, 20 Am. Rep. 480; *Mott v. Consumers' Ice Co.*, 73 N. Y. 543; *Hoffman v. N. Y. Cent., etc., R. Co.*, 87 N. Y. 25, 41 Am. Rep. 337; *Lynch v. Met. El. Ry. Co.*, 90 N. Y. 77, 43 Am. Rep. 141.

61. *Wright v. Glens Falls, S. H. & Ft. E. St. R. Co.*, 24 App. Div. (N. Y.) 617, 48 N. Y. Supp. 1026; *Cleg-horn v. N. Y. Cent., etc., R. Co.*, 56 N. Y. 44, 48; *Donovan v. Manhattan Ry. Co.*, 21 N. Y. Supp. 457; *Murphy v. Central Park, etc., R. Co.*, 48 N.

*Y. Super. Ct.* 96; *Muckle v. Rochester Ry. Co.*, 79 Hun (N. Y.) 32, 29 N. Y. Supp. 732; *Fisher v. Met. St. Ry. Co.*, 34 Hun (N. Y.) 433; *Hagan v. Providence, etc., R. Co.*, 3 R. I. 81, 62 Am. Dec. 377; *Bass v. Chicago, etc., R. Co.*, 42 Wis. 654, 24 Am. Rep. 437; *Sullivan v. Oregon, etc., R. Co.*, 12 Oreg. 392, 53 Am. Rep. 364, 21 Am. & Eng. R. Cas. 391; *Hayes v. Houston, etc., R. Co.*, 46 Tex. 272; *Lake Shore & M. S. Ry. Co. v. Prentice*, 147 U. S. 101, 13 S. Ct. 261, 37 L. ed. 97, wherein the court said: "Exemplary or punitive damages being awarded, not by way of compensation to the sufferer, but by way of punishment of the offender, and as a warning to others, can only be awarded against one who has participated in the offense. A principal, therefore, though of course liable to make compensation for injuries done by his agent within the scope of his employment, cannot be held liable for exemplary or punitive damages, merely by reason of wanton, oppressive, or malicious intent on the part of the agent. No doubt, a corporation, like a natural person, may be held liable in exemplary or punitive damages for the act of the agent within the scope of his employment, provided the criminal intent, necessary to warrant the imposition of such damages, is brought home to the corporation." *Id.*, p. 111, 37 L. ed. 102, citing *Philadelphia, W. & B. R. Co. v. Quigley*, 62 U. S. (21 How.) 202, 210, 16 L. ed. 73, 75; *Milwaukee & St. P. R. Co. v. Arms*, 91 U. S. 489, 493, 495, 23 L. ed. 374, 376; *Denver & R. G. Co.*

passenger upon the cars of a common carrier is entitled to be safely transported, and that any act on the part of the defendant's servants in carrying personal malice on the part of the servant, which results in injury to the plaintiff, must charge the carrier with liability, and that the cause of action, whether for the assault

v. Harris, 122 U. S. 597, 609, 610, 7 S. Ct. 1286, 30 L. ed. 1146, 1148; Caldwell v. New Jersey S. P. Co., 47 N. Y. 282; Bell v. Midland R. Co., 10 C. B. N. S. 287, 4 L. T. N. S. 293.

**It was also held in** the same case that the passenger was entitled to full compensation, including any additional suffering in body or mind caused by the wantonness or mischief on the part of the conductor. And see Craker v. Chicago, etc., R. Co., 36 Wis. 569; Ricketts v. Chesapeake, etc., R. Co., 33 W. Va. 43, 25 Am. St. Rep. 901; Dillingham v. Russell, 73 Tex. 47, 15 Am. St. Rep. 753; Milwaukee, etc., R. Co. v. Finney, 10 Wis. 388; Tanger v. S. W. El. Ry. Co., 85 Mo. App. 28.

**In the case of Goddard v. Grand Trunk R. Co.,** 57 Me. 202, 2 Am. Rep. 39, the court said: "We confess that it seems to us that there is no class of cases where the doctrine of exemplary damages can be more beneficially applied than to railroad corporations in their capacity as carriers of passengers; and it might as well not be applied to them at all as to limit its application to cases where the servant is directly or impliedly commanded by the corporation to maltreat and insult a passenger, or to cases where such an act is directly or impliedly ratified; for no such cases will ever occur. A corporation is an imaginary being. It has no mind, but the mind of its servants; it has no voice but

the voice of its servants, and it has no hands with which to act but the hands of its servants. All of its schemes of mischief, as well as its schemes of human minds and hands; and these minds and hands are its servants' mind and hands. And see also Taylor v. Grand Trunk R. Co., 48 N. H. 304, 4 Am. Rep. 229; Jeffersonville R. Co. v. Rogers, 38 Ind. 116, 10 Am. Rep. 103, Atlantic, etc., R. Co. v. Dunn, 19 Ohio St. 162, 2 Am. Rep. 382; Palmer v. Charlotte, etc., R. Co., 3 S. C. 580; Kansas City, etc., R. Co. v. Sanders, 98 Ala. 293, 13 So. 57; Galena v. Hot Springs R. Co., 4 McCrary (U. S.) 371; Gorman v. So. Pac. R. Co., 97 Cal. 1, 13 Pac. 1112, 33 Am. St. Rep. 157; Atlantic etc., R. Co. v. Condor, 75 Ga. 51; Lake Erie, etc., R. Co. v. Christison, 39 Ill. App. 495; Louisville, etc., R. Co. v. Wolfe, 128 Ind. 347, 25 Am. St. Rep. 436; Kansas Pac. R. Co. v. Kessler, 18 Kan. 532; Phila., etc., R. Co. v. Larkin, 47 Md. 155, 28 Am. Rep. 442; Forsee v. Alabama, etc., R. Co., 63 Miss. 67, 56 Am. Rep. 801; Louisville, etc., R. Co. v. Fleming, 14 Lea. (Tenn.) 128.

**A street car conductor who forcibly ejects a passenger** from a car under the honest belief that he has not paid his fare is not liable in a criminal prosecution for assault and battery. State v. McDonald, 7 Mo. App. 510. Of course, the carrier, under such circumstances, would be liable only for compensatory

or for negligence, is properly maintainable against the carrier.<sup>62</sup> The fact that a passenger did not exercise the best judgment in resisting the assault of a conductor did not constitute negligence on his part.<sup>63</sup> The conductor of a street car is not the driver of a "carriage" within the meaning of a statute which makes the owner of every carriage running or traveling upon any turnpike road or public highway\* for the convenience of passengers liable to the party injured, in all cases, for all injuries and damages done by any person in the employment of such owner as a driver, while driving such carriage, to any person, or to the property of any person, whether the act occasioning such injury or damage be wilful or negligent or otherwise, in the same manner as such driver would be liable.<sup>64</sup>

**§ 329. Assault upon passenger by employee — Limitations upon doctrine.** — The act of the employee complained of must be within the line of his employment; for example, where a passenger on a street car got into an altercation with the motorman, and after alighting from the car and depositing certain bundles, which he carried on the sidewalk, returned to the car, whereupon the motorman left the car and assaulted plaintiff in the street, the

damages. *Pine v. St. Paul City R.*, (Minn.) 52 N. W. 392, 52 Am. & Eng. R. Cas. 584, 16 L. R. A. 347.

**62.** *Willis v. Met. St. Ry. Co.*, 76 App. Div. (N. Y.) 340, 78 N. Y. Supp. 478; *McCann v. Sixth Ave. R. Co.*, 117 N. Y. 505, 510, 23 N. E. 164, 15 Am. St. Rep. 539; *Stewart v. Brooklyn & C. R. Co.*, 90 N. Y. 588, 592, 593, 43 Am. Rep. 185, and authorities there cited; *Dwinelle v. New York Cent. & H. R. R. Co.*, 120 N. Y. 117, 122, 24 N. E. 319, 8 L. R. A. 224, 17 Am. St. Rep. 611; *Palmeri v. Manhattan Ry. Co.*, 133 N. Y. 261, 265, 30 N. E. 1001, 16 L. R. A. 136, 28 Am. St. Rep. 632; *Hart v. Met. St. Ry. Co.*, 65 App. Div. (N. Y.) 493, 495, 72 N. Y. Supp. 797, and

authorities there cited; *Lake Shore & M. S. Ry. Co. v. Prentice*, 147 U. S. 101, 109, 13 S. Ct. 261, 37 L. ed. 97, and authorities there cited; *Mulligan v. New York & R. B. R. Co.*, 129 N. Y. 506, 512, 29 N. E. 952, 14 L. R. A. 791, 26 Am. St. Rep. 539; *Magar v. Hammond*, 54 App. Div. (N. Y.) 532, 67 N. Y. Supp. 63, and authorities cited in *Nowack v. Metropolitan St. Ry. Co.*, 166 N. Y. 433, 440, 60 N. E. 32, 54 L. R. A. 592, 82 Am. St. Rep. 691.

**63.** *Bealy v. Fresno City Ry. Co.*, 9 Cal. App. 417, 6 St. Ry. Rep. 143, 99 Pac. 400.

**64.** *Isaacs v. Third Ave. R. Co.*, 47 N. Y. 122.

plaintiff was not entitled to recover, as against the company, for such assault, it not being committed by the motorman while he was acting within the scope of his employment on the car.<sup>65</sup> So where the passenger had voluntarily left the car at a station, after having trouble with the conductor on the car, and awaited the conductor on his return trip, and the conductor left his car and

**65.** *Palmer v. Winston-Salem Ry. & Elec. Co.*, 131 N. C. 250, 42 S. E. 604; *McGilvray v. West End St. R. Co.* 164 Mass. 122, 41 N. E. 116, where the assault by the employee was upon one waiting in the street in front of the carrier's carhouse to take a car, and was unauthorized and unratified by the carrier. *La Fitte v. New Orleans, C. & L. R. Co.*, 43 La. 34, 12 L. R. A. 337, 8 So. 701; *Central Ry. Co. v. Peacock*, 69 Md. 257, 14 Atl. 709, where the assault was committed by the driver just as the passenger left the car and had reached the sidewalk for the purpose of making a complaint at the company's office; and it was held that the company was not responsible, although the assault was prompted by a quarrel between the driver and the passenger before the latter left the car, although it was suggested by the court that if, while the car stopped momentarily before the office, the passenger stepped out for the special purpose of making complaint, intending to return and resume his journey, to the knowledge of the company's servants in charge of the car, he might still have retained the relation of a passenger and be entitled to all legal rights as fully as if he had remained in the car. *Keokuk North. Line, etc., Co. v. Drew*, 88 Ill. 608; *Jeffersonville, etc., Co. v. Riley*, 39 Ind. 568; *State v. Grand Trunk Ry. Co.*, 58 Me. 176; *Goodloe v. Memphis & C. R. Co.*,

107 Ala. 233, 29 L. R. A. 729, 18 So. 166, 41 Cent. L. J. 325, where an employee struck a passenger while making a playful attempt to strike another employee. But where the assault was committed by the conductor while the passenger was in the car and repeated shortly afterward at the office of the company, whither the passenger had gone to make complaint to the superintendent, and it was impossible to determine from the evidence where the most serious wounds had been inflicted, the company was held liable. *Savannah St. R. Co. v. Bryan*, 86 Ga. 312, 12 S. E. 307.

And where a passenger boarded the car at Tacoma, paid a fare to Seattle, and asked for a transfer from Seattle to Ballard, to which he was entitled, and the conductor told him he would give the transfer between Georgetown and Seattle, but the passenger did not see the conductor between those points and requested it again on arriving at Seattle, but was then told by the conductor to get out of the way of other passengers, and so alighted, and the conductor continuing the controversy over the transfer, alighted and struck the passenger with a lantern, it was held that the relation of carrier and passenger had not terminated and the railway company was liable for the assault by the conductor. *Blomness v. Puget Sound Electric Ry.*, 47 Wash. 620, 6 St. Ry. Rep. 229, 92 Pac. 414.

stepped into the office of the company to which the car belonged, and there the passenger renewed the quarrel, and the conductor assaulted him, it was held that the company could not be held liable for the assault, because the relation of passenger and carrier had ceased.<sup>66</sup> And the rule that the corporation is responsible for the wilful acts of its employees while in the line of the discharge of their duty does not apply to a case where a passenger commences an altercation with the street car driver and thus provokes an assault by the driver.<sup>67</sup> The carrier is never liable for an injury done to a passenger by an employee while acting in self-defense.<sup>68</sup> And, as stated elsewhere, a conductor, acting in good

**66.** *Reilly v. New York City Ry. Co.*, 46 Misc. Rep. (N. Y.) 72, 91 N. Y. Supp. 319.

**67.** *Scott v. Central Park, etc., R. Co.*, 53 Hun (N. Y.) 414, 24 St. Rep. (N. Y.) 754, 6 N. Y. Supp. 382; *James v. Met. St. Ry. Co.*, 80 App. Div. (N. Y.) 364, 80 N. Y. Supp. 710, where an assault on a passenger by a conductor was provoked by the passenger's violence.

**68.** *New Orleans & N. E. R. Co. v. Jopes*, 142 U. S. 18, 35 L. ed. 919, 11 Ry. & Corp. L. J. 41, 12 S. Ct. 190, wherein the court said: "There is no misconduct when the conductor uses force and does injury in simple self-defense; and the rules which determine what is self-defense are of universal application and are not affected by the character of the employment in which the party is engaged. Indeed, while the courts hold that the liability of a common carrier to its passengers for the assaults of its employees is of a most singular character, far greater than that of ordinary employers for the actions of their employees, yet they all limit the liability to cases in which the assault and injury are wrongful." *Wise v.*

*South Covington & C. R. Co.*, 17 Ky. L. Rep. 1359, 34 S. W. 894, wherein it was held that a passenger on a street car cannot recover for abusive language addressed to him by the conductor, or for the act of the latter in knocking him down after he had left the car, where the offensive language was used and the blow struck in response to abuse and assault by the passenger, who was the aggressor. *Texas & P. R. Co. v. Williams*, (C. C. App., 5th C.) 10 C. C. A. 463, 62 Fed. 440, but the insult and wrong to justify the act of the employee must be real and not fancied; *Baltimore & O. R. Co. v. Barger*, 80 Md. 23, 26 L. R. A. 220, 30 Atl. 560, and an assault by him is not excused, or the liability of the carrier defeated, by the fact that the passenger had used grossly profane and abusive language to the conductor without provocation; *St. Louis, S. W. R. Co. v. Berger*, 64 Ark. 613, 44 S. W. 809, 39 L. R. A. 784, and if he beat the passenger, who slaps his face with his hand, and in so doing uses force greatly exceeding that which would appear to a reasonable man necessary to repel the assault, the carrier is

faith, may request a passenger to leave the car for refusal to pay fare, and on his refusal to leave, eject him, provided that he use no more force than is reasonably necessary; and the company cannot be made liable therefor.<sup>69</sup> Although a conductor has a perfect right to eject a passenger who has refused to pay his fare, he has no right to assault or otherwise maltreat him, nor to collect the fare by force or other unlawful means.<sup>70</sup> A conductor has no right to assault a passenger in ejecting him unless the resistance of the latter during his removal is of a nature to make physical violence a necessity, and then only such force may be used as is necessary to accomplish the removal.<sup>71</sup> A street railway company is not liable for an assault upon a passenger who, alighting from a car for the purpose of intervening to end a fight between the conductor and another passenger, was assaulted by the motor-man, since injuries so received result from an undertaking entirely disconnected from the contract of carriage.<sup>72</sup>

**§ 330. Assault upon passenger by employee — Where continued after alighting.** — Where an assault by conductor upon a passenger was continuous, the conductor following the passenger into the street, it is held that the relation of carrier and passenger had not ceased.<sup>73</sup> Where an assault by a conductor on a passenger begins during the relation of carrier and passenger, and appears as a consistent and indivisible whole, the fact that part of it occurs on the car and part on the street will not affect the relation between the parties.<sup>74</sup> So where in the ejection of a passenger who had

liable. *Galveston, H. S. Ry. Co. v. La Prelle*, (Tex. Civ. App.) 65 S. W. 488.

**69.** *Chicago & E. I. R. Co. v. Casazza*, 83 Ill. App. 421. See also cases cited under sections 263 and 264, *ante*.

**70.** *Bealy v. Fresno City Ry. Co.*, 9 Cal. App. 417, 6 St. Ry. Rep. 148, 99 Pac. 400.

**71.** *McQuerry v. Metropolitan St. Ry. Co.*, 117 Mo. App. 255, 5 St. Ry. Rep. 592, 92 S. W. 912.

**72.** *Zeccardi v. Yonkers R. Co.*, 190 N. Y. 389, 5 St. Ry. Rep. 713, 83 N. E. 31; revg. 113 App. Div. 649, 99 N. Y. Supp. 936.

**73.** *O'Brien v. St. Louis Transit Co.*, 185 Mo. 263, 3 St. Ry. Rep. 498, 84 S. W. 939; *Flynn v. St. Louis Transit Co.*, 113 Mo. App. 185, 4 St. Ry. Rep. 567, 87 S. W. 560.

**74.** *McQuerry v. Metropolitan St. Ry. Co.*, 117 Mo. App. 255, 5 St. Ry. Rep. 592, 92 S. W. 912.

forfeited his right to be carried, the evidence tended to show that the conductor used excessive force and assaulted him, and a moment afterwards followed him to the street, and when such person defended himself the conductor drew a revolver and shot him, it was decided that there was a continuous assault, and that the whole affray was included in the exercise by the conductor of excessive violence in the ejection\* of a passenger who had forfeited his right to carriage, but retained the right not to be subjected to unnecessary violence in his removal.<sup>75</sup>

**§ 331. Assault upon passenger by employee — Particular cases.**

— A passenger on a street car may recover damages where she is carried past her destination against her will, and thereafter the motorman addresses her in an insulting manner, and shakes his fingers and an iron bar in her face.<sup>76</sup> And where an employee of a street railway company at a public pleasure resort, owned and controlled by it, insulted a woman in the mistaken belief that she was a lewd woman, the company was held to be liable.<sup>77</sup> A street railway company is liable in damages to a passenger for insulting words spoken to her by the conductor who contradicted her true statement that she had given him a twenty-five cent piece and who called her a dead beat.<sup>78</sup> But where insulting and offensive language, unaccompanied by physical violence, were not counted on as an independent cause of action, but as preliminary to the main charge, an assault and unlawful ejection from the car, it was held error to instruct the jury to find for the plaintiff if the

**75.** *McQuerry v. Metropolitan St. Ry. Co.*, 117 Mo. App. 255, 5 St. Ry. Rep. 592, 92 S. W. 912, citing *O'Brien v. St. Louis Transit Co.*, 185 Mo. 263, 3 St. Ry. Rep. 498, 84 S. W. 939, 105 Am. St. Rep. 592; *Flynn v. St. Louis Transit Co.*, 113 Mo. App. 185, 4 St. Ry. Rep. 567, 87 S. W. 560; *Wise v. Covington & C. St. Ry. Co.*, 91 Ky. 537, 16 S. W. 351.

**76.** *San Antonio Tract. Co. v. Crawford*, (Tex. Civ. App.) 71 S. W.

**306.** See also *Texas & P. Ry. Co. v. Tarkington*, (Tex.) 66 S. W. 137. As to liability for "indecorous" conduct, see *Railroad Co. v. Ballard*, 85 Ky. 307, 3 S. W. 530.

**77.** *Davis v. Tacoma Ry. & P. Co.*, 35 Wash. 203, 3 St. Ry. Rep. 906, 77 Pac. 209.

**78.** *Gillespie v. Brooklyn Heights R. Co.*, 178 N. Y. 347, 3 St. Ry. Rep. 694, 70 N. E. 857.

conductor cursed him and called him vile names.<sup>79</sup> And it is error to allow a witness in an action brought to recover damages for an insult alleged to have been given by a conductor on a street car to testify as to the conduct of the conductor subsequent to the transactions alleged in the petition and disconnected therewith.<sup>80</sup> Where, as a passenger was descending from a street car, the conductor pushed him off, and at the same moment called on a policeman to arrest him, he had not ceased to be a passenger when the order to the policeman was given, so as to release the company from liability, if the arrest was wrongful.<sup>81</sup> Where the conductor assaulted a boy running alongside the car, the company was held liable.<sup>82</sup> Where a conductor threw a dead hen in sport at the motorman of another car, which, however, missed him and struck a window in such a car breaking the glass and injuring a passenger, the company was held liable.<sup>83</sup>

**§ 332. Liability or acts of fellow passengers or other third persons.** — As stated elsewhere, a carrier of passengers is bound to protect them from the violence and insults of other passengers and strangers, so far as this can be done by the exercise of a high degree of care. It must exercise the highest diligence reasonably practicable to protect passengers from assault, abuse, or injury at the hands of fellow passengers or third persons, if the conductor or other servant knows that it is threatened, and can prevent it with the assistance of employees and other willing passengers.<sup>84</sup> Its duty to use all proper means and precautions to protect its

**79.** *Osteryoung v. St. Louis Transit Co.*, 108 Mo. App. 703, 3 St. Ry. Rep. 566, 84 S. W. 179.

**80.** *Georgia Ry. & Elec. Co. v. Baker*, 1 Ga. App. 832, 5 St. Ry. Rep. 146, 58 S. E. 88.

**81.** *Grayson v. St. Louis Transit Co.*, 100 Mo. App. 30, 71 S. W. 730.

**82.** *Hewson v. Interurban St. Ry. Co.*, 95 App. Div. (N. Y.) 112, 3 St. Ry. Rep. 725, 88 N. Y. Supp. 816.

**83.** *Hayne v. Union St. Ry. Co.*,

189 Mass. 551, 4 St. Ry. Rep. 419, 76 N. E. 219.

**84.** See cases cited in four preceding sections. *Mullan v. Wis. C. R. Co.*, 46 Minn. 474, 5 Am. R. Corp. Rep. 19, 47 Am. & Eng. R. Cas. 649, 10 Ry. & Corp. L. J. 254, 49 N. W. 249; *Libby v. Maine C. R. Co.*, 85 Me. 34, 20 L. R. A. 812, 58 Am. & Eng. R. Cas. 81, 26 Atl. 943; *Illinois C. R. Co. v. Minor*, 62 Miss. 710, 16 L. R. A. 627, 52 Am. & Eng. R. Cas.

passengers against injuries caused by the misconduct of other passengers, such as under the circumstances might have been anticipated and could have been guarded against, is no less stringent than the obligation to prevent misconduct or negligence on the part of its own servants.<sup>85</sup> Where a carrier, through its agents, knows or could know of a threatened injury to a passenger from a third person, whether the latter is a passenger or not, and proper precautions are not taken to prevent the injury, the carrier is liable for the damage.<sup>86</sup> In order to render a street railway company liable for injuries received by a person traveling upon one of its cars, the negligence of its servants, either alone or in concurrence with the negligence or wrongful act of other persons, must be the proximate cause of the injuries. The wrongful act of a stranger is not sufficient.<sup>87</sup> To hold a carrier liable for injury to one passenger caused by another, it must be made to appear that the conduct of the particular passenger who caused the injury was such as to have made it the duty of the employees of the company to exclude him before the injury occurred.<sup>88</sup> A street railway company is liable for injuries resulting from the acts of strangers which are reasonably to be anticipated under the particular circumstances and which ordinary care and prudence, if exercised, would prevent. But it is not required to exercise the utmost case and vigilance to guard and protect pas-

441, 11 So. 101; *Partridge v. Woodland S. Co.*, (N. J.) 49 Atl. 726. But see *Pounder v. Northeastern R. Co.*, 1 Q. B. 385, 11 Ry. & Corp. L. J. 278.

See cases cited in section 328, *ante*; note 5 St. Ry. Rep. 6 *et seq.*; *Moore on Carriers*, pp. 641 *et seq.*

**85.** *Kuhlen v. Boston & N. St. Ry. Co.*, 193 Mass. 341, 5 St. Ry. Rep. 385, 79 N. E. 815.

**86.** *Savannah, F. & W. Ry. Co. v. Boyle*, 42 S. E. 242, 115 Ga. 836; *Boyle v. Savannah, F. & W. Ry. Co.*, *Id.*

**87.** *Bevard v. Lincoln Traction Co.*,

74 Neb. 802, 4 St. Ry. Rep. 673, 105 N. W. 635.

**88.** *Louisville & N. R. Co. v. McEwen*, 17 Ky. L. Rep. 406, 2 Am. & Eng. R. Cas. N. S. 438, 31 S. W. 365. A carrier is not liable for an injury to a passenger by another passenger who is being ejected from the car, although the act is done in the presence and with the knowledge of the conductor. *Springfield Consol. R. Co. v. Flynn*, 55 Ill. App. 600; *International & G. N. R. Co. v. Miller*, 9 Tex. Civ. App. 104, 28 S. W. 233; writ of error denied in 87 Tex. 430, 29 S. W. 235; *Wright v. Chicago, B.*

sengers from criminal acts of strangers, who are not under its control or subject to its orders and for whose acts it is in no way responsible.<sup>89</sup> If there be no conductor upon the car and a passenger is injured in a riotous fight among other passengers, it is for the jury to say from all the facts whether the company was negligent in failing to have a conductor, or whether the driver of the car was negligent in the performance of his duty.<sup>90</sup> If the conductor knows or has reason to believe that a passenger is a dangerous lunatic, it is his first duty to take proper action at once for the security and protection of the other passengers against his violence, and failing to discharge such duty, to communicate to the other passengers the facts within his knowledge, showing or tending to show that they are riding in a car with a violently insane man, under no guard or restraint, to the end that they themselves may take suitable precautions for their safety.<sup>91</sup>

**§ 333. Liability for acts of fellow passengers or other third persons — Application of rules.** — Carriers of passengers are not liable for injuries caused by missiles thrown by strangers which they have no right to anticipate.<sup>92</sup> Where a passenger on a street car was injured by being struck by a missile thrown at the motorman for failure to stop the car, there is no presumption of negligence

& Q. R. Co., 4 Colo. App. 102, 35 Pac. 196.

**89.** *Bosworth v. Union Ry. Co.*, 25 R. I. 202, 3 St. Ry. Rep. 783, 58 Atl. 982.

**90.** *Holly v. Atlanta St. R. Co.*, 61 Ga. 215.

**91.** *St. Louis, I. M. & S. R. Co. v. Meyer*, (C. C. A., 8th C.) 40 U. S. App. 554, 23 C. C. A. 100, 77 Fed. 150. And see, as to other instances of liability of carrier for acts of third persons not in its employe, *Chicago & A. R. Co. v. Pillsbury*, 123 Ill. 9, 14 N. E. 22; *Southern K. R. Co. v. Rice*, 38 Kan. 398; *Rommel v. Schambacher*, 120 Pa. St. 519;

*Winnegar v. Central Pass. R. Co.*, 85 Ky. 547; *St. Louis, A. & T. R. Co. v. Mackie*, 71 Tex. 491, 9 S. W. 451, 1 L. R. A. 667; *Spohn v. Missouri Pac. R. Co.*, 101 Mo. 417, 14 S. W. 880; *Gillingham v. Ohio River R. Co.*, 35 W. Va. 588, 14 L. R. A. 798; *Evansville & I. R. Co. v. Darting*, 6 Ind. App. 375; *Richmond & D. R. Co. v. Jefferson*, 89 Ga. 554, 17 L. R. A. 571; *Louisville & J. Ferry Co. v. Nolan*, 135 Ind. 60; *Louisville & N. R. Co. v. Finn*, 16 Ky. L. Rep. 57; *Sira v. Wabash R. Co.*, 115 Mo. 127.

**92.** *Woas v. St. Louis Transit Co.*, 198 Mo. 664, 5 St. Ry. Rep. 564, 96 S. W. 1017.

from the mere fact of the accident.<sup>93</sup> And where a passenger was injured by a wad shot from a cannon on a Fourth of July it was held that the railway company was not liable for the injury for failing to anticipate the injury.<sup>94</sup> Where, as the result of an explosion caused by contact of a wheel of the car with an explosive placed on the track by a stranger, a passenger was injured, the company was held not liable, as such an explosion was not one which could reasonably have been foreseen by the carrier.<sup>95</sup> And where a person waiting to board a car was injured as the result of two men stepping upon the lower step and swinging from it before the car stopped, thus striking several persons and caused them to fall upon her, it was held that such injury was the result of the negligent and rash act of the two men, and not due to any negligence on the part of those in charge of the car.<sup>96</sup> So the unusual, rude, and hasty act of a stranger in rushing through the door of a car, thereby violently striking a person on the other side, does not render the company liable;<sup>97</sup> nor the pushing of a passenger off the platform by a crowd hurrying to get to a transfer point, where the passenger with a knowledge of the conditions had forced himself into the crowd for the purpose of alighting.<sup>98</sup> But where a child was compelled by the conductor of a horse car to stand upon the crowded platform, and while there was thrown from the car by the hasty and careless exit of another passenger, the company was liable.<sup>99</sup> And where a woman brought suit for damages to her clothing and to her sensibilities while a passenger, which damages were inflicted by a puppy brought into the car by

**93.** *Woas v. St. Louis Transit Co.*, 198 Mo. 664, 5 St. Ry. Rep. 564, 93 S. W. 1017; *Fewings v. Mendenhall*, 88 Minn. 336, 93 N. W. 127, 60 L. R. A. 601, 97 Am. St. Rep. 519.

**94.** *Ormandroyd v. Fitchburg & L. St. Ry. Co.*, 193 Mass. 130, 5 St. Ry. Rep. 379, 78 N. E. 739.

**95.** *Bevard v. Lincoln Traction Co.*, 74 Neb. 802, 4 St. Ry. Rep. 673, 105 N. W. 635.

**96.** *Brice v. South Covington & C.*

*St. Ry. Co.*, 29 Ky. Law Rep. 373, 4 St. Ry. Rep. 328, 93 S. W. 37.

**97.** *Graeff v. Phila. & R. Co.*, 161 Pa. St. 230, 23 L. R. A. 606, 34 W. N. C. 384, 28 Atl. 1107, 25 Pittsb. L. J. N. S. 37.

**98.** *Chicago City R. Co. v. Considine*, 50 Ill. App. 471.

**99.** *Sheridan v. Brooklyn, etc., R. Co.*, 36 N. Y. 39, 34 How. Pr. (N. Y.) 217.

another lady passenger and permitted by the conductor to remain there, it was held that a street car company "has no right to carry dogs upon a coach that is set apart for passengers, and, if it does so, and damage is caused by said dog, it must respond to the same."<sup>1</sup> The carrier is not liable for an injury to one of its passengers by the conduct of other passengers unless it was unusual and disorderly and could have been prevented by those who had charge of the car at the time, as, for illustration, where a passenger, able to travel without attendant, was jostled and pushed and her dress stepped on by another passenger as she was alighting, the conductor at the time assisting a child in her care to alight;<sup>2</sup> or where a lady passenger's light summer dress was ignited on an open car by a match carelessly thrown by another passenger after lighting a cigarette, unless it appear that the servant in charge of the car had reason to believe that the act would be done.<sup>3</sup> But the passenger may be liable for injuries inflicted by one passenger upon another where he is jostled and thrown from the car by others in their haste to leave it, when the conductor fails to take proper precautions to prevent such accidents.<sup>4</sup> Where a person was injured by being kicked by a passenger who entered the car through the window near which plaintiff was seated and there was evidence tending to show that such practice had been permitted by the company for a considerable period of time, it was held that it was a question of fact for the jury to determine whether the defendant should, in the exercise of reasonable care, have anticipated the danger incident to allowing passengers to so enter their cars and was negligent in failing to stop the practice.<sup>5</sup>

1. *Westcott v. Seattle R. & S. Ry. Co.*, 41 Wash. 618, 4 St. Ry. Rep. 1070, 84 Pac. 588.

2. *Randall v. South Frankford, etc., R. Co.*, 139 Pa. St. 464, 22 Atl. 639; *Furgason v. Citizens' St. R. Co.*, 16 Ind. App. 171, 44 N. E. 936.

3. *Sullivan v. Jefferson Ave. R. Co.*, 133 Mo. 1, 32 L. R. A. 167, 34 S. W. 566.

4. *Sheridan v. Brooklyn, etc., R. Co.*, 36 N. Y. 39, 34 How. Pr. (N. Y.) 217; *Kreusen v. Forty-second St., etc., R. Co.*, 13 N. Y. Supp. 588; *Lott v. New Orleans City, etc., R. Co.*, 37 La. Ann. 337.

5. *Grogan v. Brooklyn Heights R. Co.*, 97 App. Div. (N. Y.) 413, 3 St. Ry. Rep. 712, 89 N. Y. Supp. 1027.

§ 334. **Same subject — Acts of intoxicated person.** — Insult to and abuse of a passenger by a drunken and disorderly fellow passenger, which the conductor permits to continue in his presence without interference, renders the carrier liable for damages.<sup>6</sup> Where the injury caused by a drunken passenger to another could have been avoided by causing the former to be and remain seated, the carrier cannot avoid liability by the failure of its servant to perform that duty.<sup>7</sup> And it is negligence in the carrier if its servants permit a drunken and disorderly passenger once ejected from the street car to re-enter and remain in the car, although the conductor had no reason to suppose that he would again assault a passenger.<sup>8</sup> But the mere presence of an intoxicated passenger is not presumed to be dangerous to other passengers. The servants and agents of a street railway company are invested with police powers for the protection of well-disposed and peaceable passengers. There is, however, no such privity between a railway company and a passenger as to make it liable for a wrongful act of the passenger upon any principle.<sup>9</sup> But a street railroad company has the power of refusing to receive as a passenger, or to expel, any one who is drunk, disorderly, or riotous, or who so demeans himself as to endanger the safety, or interfere with the reasonable comfort and convenience of other passengers, and may exercise all necessary power and means to eject from the cars any one so imperiling the safety of or annoying others; and this police power the conductor, or other servant of the company in charge

6. *Lucy v. Chicago G. W. R. Co.*, 64 Minn. 7, 31 L. R. A. 551, 65 N. W. 944. But the carrier is not liable to a passenger for injuries received by reason of being tripped by a drunken passenger who is being ejected from the car by the conductor exercising due care. *Coff v. Boston El. Ry.*, (Mass.) 60 N. E. 476; *Vinton v. Middlesex R. Co.*, 11 Allen (Mass.) 304, 87 Am. Dec. 714; *Sullivan v. Railroad Co.*, 148 Mass. 119, 18 N. E. 78, 1 L. R. A. 513; *Spade v. Railroad*

*Co.*, 172 Mass. 488, 52 N. E. 747, 43 L. R. A. 832. And see *Kinney v. Louisville & N. R. Co.*, 99 Ky. 59, 17 Ky. L. Rep. 1405, 34 S. W. 1066.

7. *Montgomery Traction Co. v. Whatley*, 152 Ala. 101, 5 St. Ry. Rep. 6, 44 So. 538.

8. *United Ry. & El. Co. v. Deane*, 93 Md. 619, 49 Atl. 923, 54 L. R. A. 942, 86 Am. St. Rep. 453.

9. *Pittsburgh, etc., R. Co. v. Hinds*, 53 Pa. St. 512, 91 Am. Dec. 224.

of the car, is bound to exercise with all the means he can command whenever occasion requires. If this duty is neglected without good cause, and a passenger receive injury, which might have been reasonably anticipated or naturally expected, from one who is improperly received or permitted to continue as a passenger, the carrier is liable.<sup>10</sup>

**§ 335. — Same subject — In case of a strike by company's employees.** — A street railway company is not, as to its passengers guilty of negligence in attempting to operate its cars during a strike of its employees, unless the conditions are such that it ought to know, or ought to reasonably anticipate, that it cannot do so and at the same time guard from violence, by the exercise of the utmost care on its part, those who accept its implied invitation to become passengers; and where a passenger was struck and injured by a missile thrown by a member of a mob of striking employees of the street car company, the failure to pull down the blinds of the car in which the injured person was riding, or stretch a heavy canvas over the outside of the car, was not negligence, justifying a recovery against the street car company.<sup>11</sup> So a street railway company, operating its cars during the existence of a strike of its employees, and running one of such cars filled with passengers, through a street crowded by a mob of strike sympathizers, where there was no indication of danger when the car approached and where the fact that the preceding car had been stoned was not known to the operators of the car in question, was held not liable for the injury of an elderly man in falling from its car while attempting to dismount after being struck by a stone thrown by some one in the mob.<sup>12</sup> Where there was a strike being

**10.** Putnam v. Broadway & S. A. R. Co., 55 N. Y. 108, 113, 14 Am. Rep. 190, 15 Abb. Pr. N. S. (N. Y.) 383; revg. 36 N. Y. Super. Ct. (4 J. & S.) 195; Pittsburgh, etc., R. Co. v. Hinds, 55 Pa. St. 512, 91 Am. Dec. 224; Flint v. Norwich & N. Y. Trans. Co., 34 Conn. 554, 6 Blatchf. 158.

**11.** Fewings v. Mendenhall, 83

Minn. 237, 86 N. W. 96; Fewings v. Mendenhall, 88 Minn. 336, 93 N. W. 127. See also Missimer v. Railroad Co., 17 Phila. 172, and it is charged with ordinary care and prudence only to guard against the lawless acts of third persons not under its direction or control.

**12.** Bosworth v. Union Ry. Co., 25

conducted by the employees of a street railway company, and a person who was a passenger on one of the company's cars, was injured by a stone which was thrown at the car by a young man who was not under the control or direction of the company, it was decided that the company was not chargeable with actionable negligence, it being declared by the court that it had been cited to no case where the high degree of care essential as to matters within the control of the carrier had been extended and applied with all its force and strictness to acts of persons beyond its control and for which it was in no way responsible, directly or indirectly, and that it would be unjust to require a street railway company to exercise such care in that case.<sup>13</sup>

§ 336. **Intoxicated persons — Ejection of.** — A railway company is not required to accept as a passenger one without an attendant who from intoxication is mentally or physically incapable of taking care of himself. But it cannot refuse to receive as a passenger one who is capable of taking care of himself and whose presence is not dangerous or hurtful or annoying to fellow passengers.<sup>14</sup> The fact that a man is intoxicated does not alone deprive him of the right to ride upon a railway car nor does it free the company from its duty to render to him as a passenger due care.<sup>15</sup> The servants of railroad companies are not bound to examine passengers as to their condition, but if they have actual notice of the weak and helpless condition of a passenger then they are bound to see that he is not placed in a position of peril.<sup>16</sup> A carrier of passengers may expel a passenger who is intoxicated and in such a condition as to be offensive, or as to make it reasonably certain that by act or speech he will become obnoxious or annoying, to the other passengers, although he has not actually

R. I. 202, 3 St. Ry. Rep. 783, 58 Atl. 982.

13. *Fewings v. Mendenhall*, 88 Minn. 336, 93 N. W. 127, 60 L. R. A. 601, 97 Am. St. Rep. 519.

14. *Price v. St. Louis I. M. & S. Ry. Co.*, 75 Ark. 469, 88 S. W. 574.

15. *Milliman v. New York Central & Hudson River R. R. Co.*, 66 N. Y. 642.

16. *Sullivan v. Seattle Electric Co.*, 51 Wash. 71, 6 St. Ry. Rep. 628, 97 Pac. 1109.

committed any act of offense or annoyance.<sup>17</sup> An intoxicated person who says he has no ticket, but has money to pay his fare, and is apparently helpless, may be excluded from a railway train, without rendering the company liable in damages.<sup>18</sup> A passenger on a street car, who acts in such a manner as to justify the inference that he is intoxicated, and falls into a deep sleep or stupor, which the conductor fails to break by shaking him, may be ejected. But it is not the due and proper care for his safety, required of the company in ejecting him, to put him, on a dark and stormy night, in an unlighted road, some distance from buildings, but where street cars are passing in each direction and teams are likely also to be passing.<sup>19</sup> A conductor requiring an intoxicated man to leave the train for non-payment of fare does not render the carrier liable for the death of the man from exposure, where the conductor did not have reasonable ground to believe that the man was unable to find his way or walk to the nearest house, or to the railroad station, or even to his own father's house, which was not far away.<sup>20</sup> The failure of a conductor to compel a young man twenty years of age, who was somewhat under the influence of liquor, to enter a car, after he had declined to do so and persisted in riding on the platform, will not render the carrier

**17.** *Montgomery Traction Co. v. Whatley*, 152 Ala. 101, 5 St. Ry. Rep. 6, 44 So. 538; *Edgerly v. Union St. R. Co.*, 67 N. H. 312, 36 Atl. 558; *Vinton v. Middlesex R. Co.*, 11 Allen (Mass.) 304; *Murphy v. Union R. Co.*, 118 Mass. 228. When boisterous, etc., see *Louisville, etc., R. Co. v. Logan*, 88 Ky. 232, 10 S. W. 655, 3 L. R. A. 80; *Gulf C., etc., R. Co. v. Adam*, 3 Tex. Civ. App. Cas. (Wilson), § 422, p. 493; *Railway Co. v. Valleley*, 22 Ohio St. 345, 30 Am. Rep. 601; *Pittsburgh, etc., R. Co. v. Pillow*, 76 Pa. St. 510. So a rule may be enforced which directs drivers to exclude intoxicated persons from the front platform. *O'Neill v. Lynn*

& B. R. Co., 155 Mass. 371, 29 N. E. 630.

**18.** *Freedon v. New York Cent., etc., R. Co.*, 24 App. Div. (N. Y.) 306, 48 N. Y. Supp. 584; *Putnam v. Broadway, etc., R. Co.*, 55 N. Y. 108.

**19.** *Hudson v. Lynn & B. R. Co.*, (Mass.) 69 N. E. 647; or at a place from which he could escape only by following the roughly-ballasted railroad track and crossing cattle-guards on the one side and a bridge over a creek on the other. *Louisville, etc., R. Co. v. Johnson*, 108 Ala. 62, 19 So. 51, 31 L. R. A. 372.

**20.** *Roseman v. Carolina C. R. Co.*, 112 N. C. 709, 16 S. E. 766, 19 L. R. A. 327, 52 Am. & Eng. R. Cas. 638.

liable for his injuries when thrown from the car, if the conductor did not think he was sufficiently drunk to be unable to care for himself, although the young man's father asked the conductor to get him to come in.<sup>21</sup> But the application of the rule of a railroad company excluding intoxicated persons from its cars is at its peril in a given case, and the company is liable for the mistakes of its servants, as, for instance, where the conductor forcibly removed a passenger, believing him to be intoxicated, but the proof showed that he was not, but was afflicted with St. Vitus dance;<sup>22</sup> or that he was simply ill and weak.<sup>23</sup> The slightest constraining power constitutes an assault under such circumstances and the question whether it was used should be left to the jury.<sup>24</sup> The carrier is not liable for the death of one by heart disease, who was rudely and roughly removed from the car by the driver under the mistaken impression that he was drunk, and placed on the sidewalk, where soon after he died; there being nothing to show that it was not the disease that killed him, or that the driver's wrongful acts in any manner produced or hastened his death.<sup>25</sup>

**§ 337. Liability of carrier for acts of employees in ejecting passengers — Right to eject.** — A street railway company has a right, by its servants, to eject a passenger for non-payment of, or refusal to pay, the proper fare or produce a valid ticket, within a reason-

**21.** *Fisher v. West Virginia, etc., R. Co.*, 42 W. Va. 183, 4 Am. & Eng. R. Cas. N. S. 86 2.; S. E. 570, 33 L. R. A. 69. As to duty of carrier to intoxicated passenger, see *Missouri P. R. Co. v. Evans*, 71 Tex. 361, 9 S. W. 325, 1 L. R. A. 476; *Milliman v. New York Cent., etc., R. Co.*, 66 N. Y. 642; *McClelland v. Louisville, etc., R. Co.*, 94 Ind. 276; *Illinois C. R. Co. v. Sheehan*, 29 Ill. App. 90; *Atchison, etc., R. Co. v. Weber*, 33 Kan. 543; *Weeks v. New Orleans, etc., R. Co.*, 32 La. Ann. 615; *Hubbard v. Town of Mason City*, 60 Iowa 400; *East Tennessee & W. N. C. R.*

*Co. v. Winters*, 85 Tenn. 240, 1 S. W. 790; *Mathison v. Staten Island M. R. Co.*, 72 N. Y. Supp. 954, 66 App. Div. (N. Y.) 610.

**22.** *Regner v. Glens Falls, etc., R. Co.*, 74 Hun (N. Y.) 202, 56 St. Rep. (N. Y.) 300, 26 N. Y. Supp. 625.

**23.** *Watson v. Oswego St. Ry. Co.*, 28 N. Y. Supp. 84, 58 St. Rep. (N. Y.) 356.

**24.** *Watson v. Oswego St. Ry. Co.*, 28 N. Y. Supp. 84, 58 St. Rep. (N. Y.) 356; *Hart v. Hudson R. Bridge Co.*, 80 N. Y. 622.

**25.** *Briggs v. Minneapolis*, 52 Minn. 36, 53 N. W. 1019.

able time, using only such force as may be reasonably necessary for that purpose, as we have shown elsewhere;<sup>26</sup> and this right is not affected by any belief the passenger may have as to his right to ride on an expired ticket which he has tendered and which has been refused.<sup>27</sup> But the company must see that its passenger is not exposed to the indignity of a public ejection from the car, during the progress of a trip for which the company has agreed to carry him, through the negligence or mistake of its agent in refusing a proper tender of fare, or in giving him a wrong ticket or transfer, or in assuming that he has not paid his fare.<sup>28</sup> One

**26.** Chapter XIII., *ante*, as to tickets, fares, and transfers, and cases there cited.

**Where a police officer assigned to special duty** in connection with the operation of street cars and paid by the company acts solely in his capacity as an officer, and not by and under the direction of the company, it is not responsible for his acts. But where it is not a part of the duty of such an officer to the public to assist in the removal of passengers who refuse to pay their fares unless the removal is accompanied by acts amounting to an actual or threatened breach of the peace and such an officer struck a passenger, seriously injuring him, in an attempt to put him off the car for non-payment of a fare upon the express or implied invitation of the conductor, there being no attempt or intention to arrest the plaintiff for a breach of the peace, the company is held to be liable. *Foster v. Grand Rapids Ry. Co.*, 140 Mich. 689, 4 St. Ry. Rep. 482, 104 N. W. 380.

**27.** *Rudy v. Rio Grande W. R. Co.*, 8 Utah 165, 52 Am. & Eng. R. Cas. 351, 30 Pac. 366, 12 Ry. & Corp. L. J. 124; *Elmore v. Sands*, 54 N. Y. 512. But see *Curtis v. Louisville City*

*R. Co.*, 94 Ky. 573, 21 L. R. A. 649, 23 S. W. 363, 15 Ky. L. Rep. 351, holding that a passenger receiving from the driver a package of nickels marked "Fifty cents," containing, however, but forty-five cents, in exchange for a fifty-cent piece, cannot be lawfully ejected for refusing to put five cents in the box, although told by the conductor that if he will put the fare in the box the mistake will be corrected by the company. *Corbett v. Twenty-third St. Ry. Co.*, 42 Hun (N. Y.) 587, holding such a regulation of the company unreasonable, and that a passenger who had inadvertently placed five cents more than the requisite fare in the box was entitled to retain the fare received from another passenger to reimburse himself, and that his ejection from the car and subsequent arrest were unwarranted; *Hayter v. Brunswick Tract. Co.*, 66 N. J. L. 575, 49 Atl. 714, holding the company liable for ejecting a passenger who had procured a transfer and taken the car to which he was directed by the conductor who issued the transfer, and upon refusal of its acceptance, declined to pay another fare.

**28.** *Kiley v. Chicago City R. Co.*,

wrongfully ejected from a street railway car is entitled to recover, although no actual personal injury is suffered.<sup>29</sup> Any disorderly conduct, like the use of indecent and profane language which might constitute a breach of the peace, for which a person might be fined and imprisoned, will justify the conductor of a street car in ejecting the offender, but the company will be liable if more force is used than was reasonably necessary.<sup>30</sup> The refusal of a passenger, upon request of the conductor, to remove his feet from the cushions of the seats, will justify his removal;<sup>31</sup> and likewise his violation of any reasonable rule of the company;<sup>32</sup> but, if not entitled to remain because of infraction of the company's rules,

90 Ill. App. 275; *affd.*, 189 Ill. 384, 59 N. E. 794.

**29.** *Light v. Harrisburg & M. El. R. Co.*, 4 Pa. Super. Ct. 427, 40 W. N. C. 352; *Rown v. Christopher & Tenth St. R. Co.*, 34 Hun (N. Y.) 471; *Pennsylvania Co. v. Bray*, 125 Ind. 229, 25 N. E. 439; *Lyons v. Broadway & S. A. R. Co.*, 32 St. Rep. (N. Y.) 232, 10 N. Y. Supp. 237; *North Chicago St. R. Co. v. Gastka*, 128 Ill. 613, 21 N. E. 521, 4 L. R. A. 481.

**30.** *Tanger v. Southwest Mo. Elec. Ry. Co.*, 85 Mo. App. 28; *Robinson v. Rockland, T. & C. R. Co.*, 87 Me. 387, 32 Atl. 994, 29 L. R. A. 530; *Flynn v. Central Park, etc., Ry. Co.*, 49 N. Y. Super. Ct. 81; *Chicago City Ry. Co. Co. v. Pelletier*, 134 Ill. 120, 24 N. E. 770; *Eads v. Met. Ry. Co.*, 43 Mo. App. 536; *Chicago, B. & Q. R. Co. v. Griffin*, 68 Ill. 499; *Vadney v. Albany Ry. Co.*, 47 App. Div. (N. Y.) 207, 62 N. Y. Supp. 140, but in an action for his ejection, it is error to receive evidence that he was arrested and charge with disorderly conduct at the time of the ejection and was acquitted, as bearing on the question of whether he was guilty of

disorderly conduct. And the fact that a passenger leaves his seat to protest with the conductor against what he considers unnecessarily rough handling of an intoxicated passenger, does not constitute a waiver of his rights as a passenger, freeing the company from liability for the conductor's act in ejecting him. *Weber v. Brooklyn, etc., R. Co.*, 47 App. Div. (N. Y.) 306, 62 N. Y. Supp. 1.

**31.** *Davis v. Ottawa Elec. R. Co.*, (Can.) 28 Ont. 654; *Louisville & N. R. Co. v. Logan*, 88 Ky. 232, 10 S. W. 655, 3 L. R. A. 80; *Gulf C. & S. F. R. Co. v. Adams*, 3 Tex. App. Civ. Cas., § 422, p. 493; *Railway Co. v. Valleley*, 32 Ohio St. 345, 30 Am. Rep. 601.

**32.** *Gulf C. & S. F. R. Co. v. Moody*, 3 Tex. Civ. App. 622, 22 S. W. 1009; *McMillan v. Federal St. & P. V. Pass. R. Co.*, 172 Pa. St. 523, 33 Atl. 560, 37 W. N. C. 543, 26 Pittsb. L. J. N. S. 303; *Fort Clark St. R. Co. v. Ebaugh*, 49 Ill. App. 582; *Montgomery v. Buffalo Ry. Co.*, 24 App. Div. (N. Y.) 454, 48 N. Y. Supp. 849, 165 N. Y. 139; *Meyer v. Second Ave. R. Co.*, 8 Bosw. (N. Y.) 305.

only reasonable force should be used in removing him, for a refusal to leave.<sup>33</sup> A street railway company has authority to enforce observance of its regulations; but by preventing, not by punishing, the breach of them. It has no power of retribution, and is incapable of compelling conformity to its rules by the imposition of a penalty. The ejection of a passenger for an act already accomplished, as for example, boarding the car in an improper manner, would involve a forfeiture of his right to be carried on the car. It is only by present or prospective, and not by past, misconduct that a passenger loses his privileges.<sup>54</sup> If a passenger be intoxicated so as to make it reasonably certain that by act or speech he will become obnoxious or annoying to other passengers, although he has committed no act of offense or annoyance, he may be ejected.<sup>35</sup> A person rightfully on the car has a right to refuse to be ejected from it and to make a sufficient resistance to being put off to denote that he is being removed by expulsion and against

**33.** *Hart v. Met. St. Ry. Co.*, 34 Misc. Rep. (N. Y.) 521, 69 N. Y. Supp. 906; *Smith v. Manhattan Ry. Co.*, 138 N. Y. 623, 18 N. Y. Supp. 759, 33 N. E. 1083. In the former case plaintiff, intending to become a passenger, boarded the front platform of defendant's street car while in motion, and was then seized by the gripman and thrown from the moving car into the street, and it was held that plaintiff was on the car as a passenger, and was entitled to protection from assault by defendant's employees, and having placed himself in a position of safety so far as the moving of the car had any bearing on the injury, the act of boarding the car was not contributory negligence. In the latter case, plaintiff having paid his fare, entered defendant's elevated railway train by leaping on the rear platform in violation of a rule of the company, and an attempt was made to eject him. It was

held that no matter what the irregularity in attempting to board the train, his presence there was rightful and defendant was liable for his injuries resulting from the attempted ejection.

**34.** See preceding note.

**35.** *Edgerly v. Union St. R. Co.*, 67 N. H. 312, 36 Atl. 558; *Vintner v. Middlesex*, 11 Allen (Mass.) 304, 87 Am. Dec. 714; *Murphy v. Union R. Co.*, 118 Mass. 228. A peaceful drunken person, kicked off the platform of a street car, may recover for his injuries. *Texas & P. R. Co. v. Edmond*, (Tex.) 29 S. W. 518. And, although a passenger is sick and his offensive conduct is not voluntary or wilful, it will not affect the right of the carrier's servants to remove him. but proper care must be exercised for his protection and safety. *Conolly v. Crescent City R. Co.*, 41 La. Ann. 57, 6 So. 536.

See section 336, herein.

his will.<sup>36</sup> If not rightfully on the car and he resists ejection and the injury happens and can be attributed, in part at least, to his own wrongful conduct, the carrier is not responsible.<sup>37</sup>

**§ 338. Liability of carrier for acts of employees in ejecting passengers — Duty of company.** — In expelling a passenger the carrier must take reasonable care to see that he is not injured, and where a conductor ejects a passenger for non-payment of fare while the car is in motion, by reason of which the passenger sustains injury which he would not have sustained had he been ejected while the car was at a standstill, the company is liable for such injury. But the mere fact that the car is in motion at the time of the expulsion will not justify a recovery against the carrier for an injury which may result. It must appear that the injury resulted solely from the ejection while the car was in motion, or from the negligence of the carrier, and generally it is a question for the jury.<sup>38</sup> Where the passenger is under the influence of liquor and the conductor undertakes to remove him for refusal to pay his fare, it is the duty of the conductor to act in a prudent manner in removing him, using no more force than is necessary, and if he fail to do so and plaintiff is thereby injured, the company will be liable.<sup>39</sup> And where, in an action for malicious assault and ejecting of a passenger from a street car, it was shown that the conductor was prosecuted before a justice, and that the railroad defended him

**36.** *Lucas v. Michigan C. R. Co.*, 98 Mich. 1, 56 N. W. 1039; *Breen v. St. Louis Transit Co.*, 102 Mo. App. 479, 77 S. W. 78; *Pittsburg, etc., R. Co. v. Russ*, (C. C. A., 7th C.) 6 C. C. A. 597, 57 Fed. 822.

**37.** *McCullen v. New York & N. S. Ry. Co.*, 68 App. Div. (N. Y.) 269, 74 N. Y. Supp. 209.

**38.** *Cleveland City Ry. Co. v. Roebuck*, 22 Ohio C. C. 99, 12 Ohio C. D. 262; *Healey v. City Pass. R. Co.*, 28 Ohio St. 23; *Murphy v. Union R. Co.*, 118 Mass. 228; *Flynn v. Central*

*Park, etc., R. Co.*, 49 N. Y. Super Ct. 81; *Oppenheimer v. Manhattan R. Co.*, 45 St. Rep. (N. Y.) 134, 18 N. Y. Supp. 411; *Kiley v. Chicago City R. Co.*, *supra*, a passenger cannot recover for injuries which he voluntarily brings upon himself by resisting removal or undertaking to retain his place in the car by force.

**39.** *Central Ry. Co. v. Mackey*, 103 Ill. App. 15; *Lovett v. Salem & S. D. R. Co.*, 9 Allen (Mass.) 537, although it is a question for the jury to determine.

by its attorneys, and that its general manager was present at the trial, paid the conductor's fine, and that he was retained in the company's employ after the assault, it justified a finding that the company ratified the conductor's acts.<sup>40</sup> The conductor is not justified in any case in ejecting a person from his car under circumstances which make such ejection dangerous to life or limb.<sup>41</sup> The expulsion of a passenger while the car is in motion is apparently so dangerous an act that it may justify the same resistance on the part of the passenger as if it were a direct attempt on his life; and such resistance will not be deemed to present a case of concurrent negligence on his part.<sup>42</sup> The fact that a passenger on a street car is affected by nausea, which may be aggravated by going inside the car, is no excuse for his non-compliance with a regulation that passengers shall not ride on car platforms, and furnishes him no legal reason for complaining because the conductor, without excessive force or physical injury, enforced the rule by ejecting him from the car.<sup>43</sup> If the carrier's servants use

**40.** *Denison & S. Ry. Co. v. Randall*, (Tex.) 69 S. W. 1013.

**41.** *Chicago City R. Co. v. Pelletier*, 33 Ill. App. 455. And see 134 Ill. 120.

Where in an action for the ejection of a passenger for refusal to pay fare it appeared that the plaintiff was forcibly removed from a seat near the front end of the car and out of the body of the car onto the back platform by defendant's servants and defendant's road officer raised the controller handle over the plaintiff's head in a threatening manner, it was held not to be error for the court to instruct the jury that plaintiff was entitled to recover if he was put in peril of his life and of great bodily harm and was ejected from the car. *Carmody v. St. Louis Transit Co.*, 122 Mo. App. 338, 5 St. Ry. Rep. 536, 99 S. W. 495.

**42.** *Sanford v. Eighth Ave. R. Co.*, 23 N. Y. 343; *Higgins v. Watervliet Turnp. Co.*, 46 N. Y. 23; *Isaac v. Third Ave. R. Co.*, 47 N. Y. 122; *Hamilton v. Third Ave. R. Co.*, 40 How. (N. Y.) 297; *Day v. Brooklyn City R. Co.*, 12 Hun (N. Y.) 435; *affd.*, 76 N. Y. 593; *Union Pac. R. Co. v. Mitchell*, 56 Kan. 324, 43 Pac. 244. As a matter of law, it is negligence on the part of the carrier to compel a small child, though a trespasser, to jump from the platform of a moving car. *Biddle v. Hestonville, etc.*, Ry. Co., 112 Pa. St. 551; *Pittsburgh, etc.*, Ry. Co. v. *Donahue*, 70 Pa. St. 119.

**43.** *Montgomery v. Buffalo Ry. Co.*, 165 N. Y. 139, 58 N. E. 770; *affg.* 24 App. Div. (N. Y.) 454, 48 N. Y. Supp. 849, and whether the rule was a reasonable one was a question for the court.

more force than is necessary to eject a passenger, the company will be liable.<sup>44</sup> But where the violence was due to the conduct of the party ejected, calculated to arouse the conductor's resentment and render him unfit for the proper discharge of his duties, the carrier is not liable for excessive force used.<sup>45</sup> That the passenger left the car at the command of the conductor and without waiting to be forcibly expelled does not prevent his action for injuries, if the expulsion was wrongful; and the humiliation and injury to his feelings caused by the insulting remarks of the conductor may enhance his damages.<sup>46</sup> Where a complaint alleges that the injuries were caused by the negligence of the defendant, evidence on the part of the plaintiff that he had an altercation with the conductor, who wilfully pushed him from the car, is proper, as it constitutes the transaction by reason of which plaintiff claims that defendant was negligent.<sup>47</sup> But the exclamations of a fellow passenger of deceased that his ejection at a certain point would be "murder" are inadmissible, being a mere expression of opinion.<sup>48</sup> Where the

**44.** *Haman v. Omaha H. R. Co.*, 35 Neb. 74, 52 N. W. 830; *Schaefer v. North Chicago St. R. Co.*, 82 Ill. App. 473; *Burns v. Glens Falls, etc., R. Co.*, 4 App. Div. (N. Y.) 426, 38 N. Y. Supp. 856; *Lake Erie & W. R. Co. v. Matthews*, 13 Ind. App. 355, 41 N. E. 842; *Galveston, etc., R. Co. v. McMonigal*, (Tex.) 25 S. W. 341; *Hamilton v. Third Ave. R. Co.*, 53 N. Y. 25; *revg.* 35 N. Y. Super. Ct. (3 J. & S.) 118, 13 Abb. Pr. N. S. 318; *Jackson v. Second Ave. R. Co.*, 47 N. Y. 274; *Tanger v. Southwest Mo. Elec. Ry. Co.*, 85 Mo. App. 528.

**45.** *City El. R. Co. v. Shropshire*, 110 Ga. 33, 28 S. E. 508.

**Provocation** on the part of a passenger, which in law does not amount to justification, will not be considered in mitigation of compensatory damages though they may in mitigation of exemplary damages. *Mahoning*

*Valley Ry. Co. v. De Pascale*, 70 Ohio St. 179, 71 N. E. 633, 16 Am. Neg. Rep. 548.

**46.** *Conlon v. Met. St. R. Co.*, 34 Misc. Rep. (N. Y.) 394, 69 N. Y. Supp. 653; *Eddy v. Syracuse R. T. R. Co.*, 50 App. Div. (N. Y.) 109, 63 N. Y. Supp. 645; *Ray v. Cortland & H. Tract. Co.*, 19 App. Div. (N. Y.) 530, 46 N. Y. Supp. 521; *Consol. Tract. Co. v. Taborn*, 58 N. J. L. (29 Vroom) 1; *affd.*, 58 N. J. L. 408, 2 Am. & Eng. R. Cas. N. S. 124, 32 Atl. 685; *Central R. & Bkg. Co. v. Roberts*, 91 Ga. 513, 18 S. E. 315; *Watson v. Oswego St. R. Co.*, 7 Misc. Rep. (N. Y.) 562, 58 St. Rep. (N. Y.) 356, 28 N. Y. Supp. 84; *Mabry v. City Elec. Ry. Co.*, 116 Ga. 624, 42 S. E. 1025.

**47.** *Block v. Third Ave. R. Co.*, 60 App. Div. (N. Y.) 191, 69 N. Y. Supp. 1107.

**48.** *Sullivan v. Seattle Electric*

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carrier's servant wantonly assaults the passenger in removing him from the car, and the carrier, after knowledge thereof, retains the servant in his employment, he ratifies the act and is liable to punitive damages.<sup>49</sup> Where the attempted ejection of a passenger from a street car is accompanied by a malicious assault, punitive damage are properly awarded.<sup>50</sup> A verdict of two hundred and fifty dollars as compensation for indignity, humiliation, and injury to feelings, received through a technical assault committed in ejecting a passenger from a street car, is excessive.<sup>51</sup>

**§ 339. Disposition of articles left in car.** — Where a passenger inadvertently leaves a package, parcel, or other property in the car on leaving, it is ordinarily matter of regulation for the carrier company that its employees should take charge of it. It is a matter of convenience at times for passengers to carry with them light and portable articles, and they occasionally leave such articles behind them on hurriedly quitting the car. Where a street railway company for the better security of the property of passengers on its cars makes it the duty of its agents and servants to take charge of property so left by passengers in its cars, and provides at its depot or elsewhere a place for its safe-keeping where the owner may apply for it, it must be deemed part of its business to take charge of such property, and it becomes responsible therefor. While it does not engage for the carriage of property of any kind, and does not incur respecting it the extraordinary liability which the law imposes upon a common carrier of merchandise, the existence of the regulation it has adopted shows that it has undertaken, as incidental to its business, to care for such property, if left in the car, when the fact is brought to its knowledge, and restore it to the custody of the proper person on application, and the specific

Co., 51 Wash. 71, 6 St. Ry. Rep. 628,  
97 Pac. 1109.

**49.** *Tanger v. Southwest Mo. El.*  
*Ry. Co.*, 85 Mo. App. 28.

**50.** *Madigan v. St. Louis Transit*  
*Co.*, 117 Mo. App. 118, 5 St. Ry. Rep.  
629, 93 S. W. 316.

See section 510, *post*, herein as to  
punitive damages.

**51.** *Conlon v. Met. St. Ry. Co.*,  
34 Misc. Rep. (N. Y.) 394, 69 N. Y.  
Supp. 653.

compensation which it receives for the carriage of the passenger is sufficient to constitute it a bailee for hire, while the property remains in its custody; and if it deliver such property to another person than the owner, without the exercise of due care and precaution, it is liable for its value.<sup>52</sup> Where a passenger inadvertently left a pocketbook containing more than one hundred dollars in money in the car, which the conductor who found it delivered to the proper representative of the carrier; the finding of the pocketbook was advertised and nobody claimed it; and, there being no means of identifying the property or discovering its owner, after the lapse of a year the conductor demanded of the company's agents a return of the pocketbook and its contents to himself, and, upon refusal to deliver, brought suit, it was held that, as the title of the finder of a chattel who acts with fairness is superior to that of any person except the owner, the conductor was entitled to recover the value.<sup>53</sup>

§ 340. **Liability for articles lost by passenger.** — To entitle a passenger to a recovery for loss of baggage from a street car, it must be shown that the company accepted the baggage under a contract, express or implied, to carry and deliver it as common carriers, or that its loss was due to the negligence of the company. When a carrier does not take full possession of baggage, and it remains under the control of the passenger, the former, in the absence of special agreement, does not assume the carrier's liability of an insurer, but becomes responsible only when it is shown that the carrier has failed to exercise reasonable care to protect from loss or injury such baggage or property as the passenger has the right to bring with him into the car.<sup>54</sup> So where a con-

52. *Morris v. Third Ave. R. Co.*, 23 How. Pr. (N. Y.) 345, 1 Daly (C. P. N. Y.) 202, wherein it was also held that it was a question for the jury as to whether there was negligence on the part of the company; that where property so comes into the possession of the carrier, and where the carrier may not know to

whom it belongs or by whom it was left, it should not be responsible for delivering it to the wrong person, if it has exercised all the care and vigilance that could reasonably be expected of it under the circumstances.

53. *Tatum v. Sharpless*, 6 Phila. (Pa.) 18.

54. *Sperry v. Consolidated Ry. Co.*,

ductor of a street car takes a dress-suit case from a passenger when it is handed to him, and places it in the car within the sight and control of the passenger for the purpose of assisting her, and is not requested to take the suit case into his charge, he does not assume the custody of it.<sup>55</sup>

§ 341. **Liability for false arrest of passenger.** — It is the duty of a street railroad company to treat its passengers with courtesy and kindness; and where one of its employees, while engaged in the business of the company, whether wilfully and maliciously, or in consequence of what he considered a duty, ill-treats a passenger, so far as to wrongfully cause his arrest, the company is liable for it.<sup>56</sup> And where the evidence shows that a passenger was arrested without any cause, charged with an offense, and forced to undergo a trial, it has been decided that express malice may be found, and that the company is liable.<sup>57</sup> A statute giving the conductor all the powers of a conservator of the peace while in charge of the car does not relieve the carrier from liability for false imprison-

79 Conn. 565, 5 St. Ry. Rep. 64, 65 Atl. 962.

55. *Sperry v. Consolidated Ry. Co.*, 79 Conn. 565, 5 St. Ry. Rep. 64, 65 Atl. 962.

56. *Kansas*. — See *Atchison, T. & S. F. R. Co. v. Henry*, 55 Kan. 715, 41 Pac. 952, 29 L. R. A. 465, 2 Am. & Eng. R. Cas. N. S. 418.

*Massachusetts*. — *Kralewitz v. Eastern R. Co.*, 143 Mass. 228, 9 N. E. 613.

*Mississippi*. — *King v. Illinois C. R. Co.*, 69 Miss. 245, 10 So. 42.

*New York*. — *Stewart v. Brooklyn & C. R. Co.*, 90 N. Y. 588; *Hoffman v. New York Cent. & H. R. R. Co.*, 87 N. Y. 25; *Jacobs v. Third Ave. R. Co.*, 71 App. Div. 199, 75 N. Y. Supp. 679; *Corbett v. Twenty-Third St. R. Co.*, 42 Hun 587; *Roun v. Christopher & T. St. R. Co.*, 34 Hun 471;

*Shea v. Manhattan R. Co.*, 27 St. Rep. 33, 7 N. Y. Supp. 497; *affd.*, 15 Daly 528, 8 N. Y. Supp. 332, 29 St. Rep. 313; *White v. Twenty-Third St. R. Co.*, 20 Week. Dig. 510.

*North Carolina*. — *Kelly v. Durham Traction Co.*, 132 N. C. 368, 43 S. E. 923, 14 Am. Neg. Rep. 164.

See *Moore on Carriers*, pp. 638 *et seq.*

Under the rules of a street car company, giving the conductor authority to call a policeman, the act of a conductor in calling a policeman to arrest a passenger then on the car is within the scope of his authority, and, if wrongful, the company is liable. *Grayson v. St. Louis Trans. Co.*, (Mo.) 71 S. W. 730.

57. *Dwyer v. St. Louis Transit Co.*, 108 Mo. App. 152, 3 St. Ry. Rep. 568, 83 S. W. 303.

ment of a passenger made or caused to be made by him.<sup>58</sup> But the arrest of a street car passenger by a policeman called by the conductor of the car to arrest and take him off, on the charge of riding without payment of fare, does not render the carrier liable for false imprisonment, when the conductor had been authorized only to put delinquent passengers off the car.<sup>59</sup> Where, however, an elevated railroad company had ordered its gatekeepers not to allow passengers to go out unless they surrendered tickets or paid fares, and a passenger, having lost his ticket on the route, stated the fact to the gatekeeper at his destination, but was forbidden by him to pass unless he produced his ticket or paid his fare, and he, insisting on passing, was arrested by the police at the direction of the gatekeeper, the company was liable for false imprisonment.<sup>60</sup> While a common carrier of passengers, by its contract of transportation, undertakes to protect the passenger against any injury arising from the negligence or wilful misconduct of its servants when engaged in the performance of their duties, to warrant a recovery of damages alleged to have been caused by a breach of the undertaking, the negligence or wilful misconduct must not only be shown, but it must also appear that the servant was acting at the time in the course of his employment. The carrier is not liable for a malicious prosecution and false imprisonment of a passenger caused by his arrest by its conductor on a charge, for instance, of passing counterfeit money, unless the conductor acted within the scope of his authority, express or implied, or the carrier subsequently ratified his proceedings.<sup>61</sup> The

58. *Gillingham v. Ohio River R. Co.*, 35 W. Va. 588, 14 S. E. 243, 14 L. R. A. 798.

59. *Little Rock Trac. & E. Co. v. Walker*, 64 Ark. 144, 40 L. R. A. 473, 45 S. W. 57. And see *Central R. Co. v. Brewer*, 78 Md. 394, 27 L. R. A. 63, 28 Atl. 615; *Carter v. Howe Mach. Co.*, 51 Md. 290, 34 Am. Rep. 199; *Mali v. Lord*, 39 N. Y. 381, 100 Am. Dec. 448; *Eastern Counties R. Co. v. Brown*, 6 Exch. 314; *Poulton*

*v. London & S. W. R. Co.*, L. R. 2 Q. B. 534; *Edwards v. London & N. W. R. Co.*, L. R. 5 C. P. 445; *Allen v. London & S. W. R. Co.*, L. R. 6 Q. B. 65; *Dierig v. South Covington & C. St. Ry. Co.*, 24 Ky. L. Rep. 1825, 72 S. W. 355; *Ruth v. St. Louis Trans. Co.*, (Mo.) 71 S. W. 1055.

60. *Lynch v. Met. Elev. R. Co.*, 90 N. Y. 77, 43 Am. Rep. 141.

61. *Mulligan v. New York & R. B. R. Co.*, 129 N. Y. 506, 42 St. Rep.

unlawful arrest of a passenger on a street car, procured by a road officer of the railway company, where such road officer is the superior of the conductor, renders the railway company liable for the tort.<sup>62</sup>

§ 342. **Injuries to passengers in collisions with cars and other vehicles — Generally.** — A street railroad company is liable for injuries to a passenger, who was without contributory negligence, from a collision due to negligence, however slight, on the part of its employees, or which by the exercise of ordinary human foresight could have been avoided.<sup>63</sup> A passenger traveling in a

(N. Y.) 83, 29 N. E. 952, 14 L. R. A. 791; *La Fitte v. New Orleans & L. R. Co.*, (La.) 12 L. R. A. 337, 8 So. 701; *Cunningham v. Seattle El. L. & P. Co.*, 3 Wash. 471, 28 Pac. 745; *Knight v. N. Met. T. Co.*, (Q. B.) 7 L. T. Rep. 227; *Charleston v. London Tramways Co.*, 36 Week. Rep. 367.

**But it has been held** that a ticket agent who follows a woman who has bought a ticket out upon the platform and charges her with having given him counterfeit money, with demand for other money in its stead, and on her refusal, insults her by slandering her character, and puts his hand upon her, telling her not to stir until he gets a policeman to arrest and search her, and then lets her go when he fails to get an officer — is acting within the scope of his employment, and the carrier is liable for false imprisonment and slander, if the charges were false and the detention unlawful. *Palmeri v. Manhattan R. Co.*, 133 N. Y. 261, 40 St. Rep. (N. Y.) 894, 30 N. E. 1001, 16 L. R. A. 136. And see *Nowack v. Met. St. R. Co.*, 166 N. Y. 433, 60 N. E. 32; *Barry v. Third Ave. R. Co.*, 51 App. Div. (N. Y.) 385, 64 N. Y. Supp. (98 St. Rep.) 615; *Lezensky v.*

*Met. St. Ry. Co.*, 59 U. S. App. 588, 88 Fed. 437, 31 Chic. Leg. N. 42.

**Action for malicious prosecution**, in case of arrest of passenger, held not maintainable. *Boden v. St. Louis Transit Co.*, 108 Mo. App. 568, 3 St. Ry. Rep. 568, 84 S. W. 181.

**62.** *Carmody v. St. Louis Transit Co.*, 122 Mo. App. 338, 5 St. Ry. Rep. 536, 99 S. W. 495.

**63.** *Chicago & Milwaukee Elec. Ry. Co. v. Ullrich*, 213 Ill. 170, 3 St. Ry. Rep. 141, 72 N. E. 815; *Chicago City Ry. Co. v. McClain*, 211 Ill. 589, 3 St. Ry. Rep. 140, 71 N. E. 1103; *Chicago Union Trac. Co. v. Reuter*, 210 Ill. 279, 3 St. Ry. Rep. 140, 71 N. E. 323; *Hamilton v. Great Falls St. R. Co.*, 17 Mont. 334, 42 Pac. 860, rehearing denied 17 Mont. 351, 43 Pac. 713.

See *Moore on Carriers*, pp. 696 *et seq.*

**The doctrine of res ipsa loquitur** applies in an action by a passenger resulting from a collision. *Harris v. Puget Sound Electric Ry.*, 52 Wash. 289, 6 St. Ry. Rep. 674, 100 Pac. 838. The court said: "The mere fact that the collision occurred was sufficient to make a *prima facie* case of negligence so as to place the responsibility upon the appellant. Wil-

street car is not bound, as is a person approaching a dangerous crossing, to keep all his senses alert and be constantly on the lookout for danger. He has, while exercising ordinary care and

liams v. Spokane Falls & N. R. Co., 39 Wash. 77, 80 Pac. 1100; Firebaugh v. Seattle Electric Co., 4 St. Ry. Rep. 1055, 40 Wash. 658, 82 Pac. 995, 2 L. R. A. (N. S.) 836, 111 Am. St. Rep. 990; Jordan v. Seattle, etc., R. Co., 47 Wash. 503, 92 Pac. 284; Russell v. Seattle, etc., R. Co., 47 Wash. 500, 92 Pac. 288." *Per* MOUNT, J.

See Wilbur v. Southwest Missouri Elec. Ry. Co., 110 Mo. App. 689, 3 St. Ry. Rep. 562, 85 S. W. 671.

A passenger in an action against a street railway company for injuries caused by collision due to an obstruction on the track by alleging particularly the cause of the accident does not waive her right to a presumption of negligence on the part of the railway company from the happening of the collision. Walters v. Seattle R. & S. Ry. Co., 45 Wash. 233, 6 St. Ry. Rep. 317, 93 Pac. 419.

**A street car company is liable for injuries to a passenger** resulting from a collision with a hook and ladder wagon caused by want of a proper degree of care by the employees of the company, although the negligence of the driver contributed to the accident. Olsen v. Citizens' Ry. Co., 152 Mo. 426, 54 S. W. 470.

Where a hose wagon, being driven at a high rate of speed, ran against the side of a street car, the tongue or pole of the wagon crashing its way through the side of the car, striking a passenger between the knee and hip, causing her painful and serious injury, it was held that these facts established a *prima facie* case of neg-

ligence on the part of the street railway company. Williamson v. St. Louis & M. R. R. Co., 133 Mo. App. 375, 113 S. W. 239.

**The plaintiff has the burden of proof.** — Thurston v. Detroit United Ry. Co., 137 Mich. 231, 3 St. Ry. Rep. 449, 100 N. W. 395. See Black v. Boston Elev. Ry. Co., 187 Mass. 172, 72 N. E. 970.

In the case of an injury to a passenger by a collision an instruction that a carrier is liable for injuries to a passenger caused by the "slightest negligence" has been held proper. Chicago City Ry. Co. v. Shaw, 220 Ill. 532, 4 St. Ry. Rep. 203, 77 N. E. 139, citing and following Chicago & Alton Ry. Co. v. Byrum 153 Ill. 131, 38 N. E. 578.

**It is proper to prove** in an action for damages arising out of a collision, the grades, cuts, and curves in the railroad, not for the purpose of basing negligence thereon, but in order to show the situation at the point of the accident. Harris v. Puget Sound Electric Ry., 52 Wash. 289, 6 St. Ry. Rep. 674, 100 Pac. 838.

But in an action to recover damages against a street railway company for injuries to a passenger in a collision between a passenger car and a freight car, testimony as to statements of the motorman, made eighteen hours before the accident and at a place five miles distant, is hearsay and no part of the *res gestæ*. Rouston v. Detroit United Ry., 151 Mich. 237, 6 St. Ry. Rep. 503, 115 N. W. 62.

Negligence for jury; collision be-

prudence on his own part, a right to presume that the railway company in whose care he is traveling will discharge its duty towards him as a passenger and exercise that high degree of care for his protection which the law requires of it.<sup>64</sup> The driver or motorman of a street car, notwithstanding his car has a superior right of way, should stop or slacken his speed to avoid imminent danger from collision with vehicles upon the street; and the fact that a collision occurs by reason of the negligence of the driver of the other vehicle will not relieve the carrier from liability for its negligence, proved to have been the efficient and proximate cause of the injury.<sup>65</sup> The degree of caution and vigilance to be exer-

tween car and vehicle caused by wheel of latter slewing in attempting to leave tracks; question of company's negligence for jury. *Walsh v. North Jersey St. Ry. Co.*, 71 N. J. L. 641, 3 St. Ry. Rep. 606, 60 Atl. 335.

So, whether a motorman of a freight car, who started down an incline at the rate of fifteen miles an hour, relying upon air brakes to properly check the speed of the car, and knowing that a car loaded with passengers was at the foot of the incline, was guilty of negligence was a question for the jury. *Rouston v. Detroit United Ry.*, 151 Mich. 237, 6 St. Ry. Rep. 503, 115 N. W. 62.

**Pleading.** — In an action by a passenger to recover for an injury sustained in a collision it is sufficient for him to charge in general terms that he was injured while being carried as a passenger, as a result of the negligence of the carrier. *Hamilton v. Metropolitan St. Ry. Co.*, 114 Mo. App. 504, 5 St. Ry. Rep. 627, 89 S. W. 893.

**64.** *Jones v. United Rys. & Elec. Co.*, 99 Md. 64, 57 Atl. 79, 16 Am. Neg. Rep. 79.

**65.** *West Chicago St. R. Co. v.*

*Tuerk*, 90 Ill. App. 105; *Chicago & A. R. Co. v. McDonnell*, 91 Ill. App. 488, where a passenger is injured in a collision between a street car and a railroad train, if the negligence of the railroad company operate as the proximate cause of the injury, the fact that the street car company was also guilty of negligence will not relieve the railroad company of its liability. *Keegan v. Third Ave. R. Co.*, 34 App. Div. (N. Y.) 297, 54 N. Y. Supp. (88 St. Rep.) 391, a street railroad company is not necessarily absolved from liability to a passenger injured in a collision because a wagon struck the car in which he was riding, instead of the car striking the wagon; *Devlin v. Atlantic Ave. R. Co.*, 57 Hun (N. Y.) 591, 10 N. Y. Supp. 848, 32 St. Rep. (N. Y.) 938, reversing nonsuit for injury to a passenger on a street car sustained through collision with a wagon, where the driver of the car was negligent in starting, under circumstances rendering collision inevitable; *Fox v. Brooklyn City R. Co.*, 27 N. Y. Supp. 895, 58 St. Rep. (N. Y.) 540, 7 Misc. Rep. (N. Y.) 285, where defendant's street car on which plain-

cised in avoiding collision with other vehicles is greater where the street car is an open one with passengers sitting near the ends of the seats, when a collision would almost necessarily result in injury, than would be demanded in the management of closed cars, and if there be any element of negligence in the case, it must be submitted to the jury.<sup>66</sup> It seems that in case of a sudden emergency a failure to exercise the best judgment which the case rendered possible cannot be claimed as lack of skill or care.<sup>67</sup> But an error of judgment in one suddenly placed in peril does not relieve him from the consequences of the negligence which caused such position, and where a passenger on a street car was injured by a collision with a car crossing the railroad track, and the evidence showed that the driver of the car plaintiff was in could see the other track for a considerable distance before he approached it and that he was driving at the rate of six miles an hour, it was held that the question of negligence was proper for the jury.<sup>68</sup> A street railway company cannot escape liability for a collision by merely showing that the collision was caused by some obstruction on the track caused by an agency over which it had no control. The company must show that it could not by the highest degree of care and diligence consistent with the practical operation of

tiff was a passenger was driven against a wagon standing partly upon the car track so that plaintiff was thrown off the front platform and injured; *Watkins v. Atlantic Ave. R. Co.*, 20 Hun (N. Y.) 237; *Smith v. St. Paul City R. Co.*, 32 Minn. 1, 16 Am. & Eng. R. Cas. 310; *Walker v. Atlantic Ave. R. Co.*, 11 N. Y. Supp. 742, 34 St. Rep. (N. Y.) 118, dismissal of complaint in an action against a street railroad company for injury to plaintiff from the kick of a horse attached to a car alongside the car plaintiff was in, reversed, every intendment in such case being held to be in plaintiff's favor.

**66.** *Seidlinger v. Brooklyn City R.*

*Co.*, 28 Hun (N. Y.) 503; *affd.*, 97 N. Y. 642.

**67.** *Wynn v. Central Park, etc., R. Co.*, 133 N. Y. 575, 44 St. Rep. (N. Y.) 673, 30 N. E. 721; *Lewis v. Long Island R. Co.*, 162 N. Y. 52, 56 N. E. 548; *Bittner v. Crosstown Ry. Co.*, 153 N. Y. 76, 46 N. E. 1044; *Stabernau v. Atlantic Ave. R. Co.*, 155 N. Y. 511, 50 N. E. 277.

**68.** *Schneider v. Second Ave. R. Co.*, 133 N. Y. 583, 44 St. Rep. (N. Y.) 680, 30 N. E. 752; *Morris v. Lake Shore, etc., R. Co.*, 148 N. Y. 182, 42 N. E. 579, negligence is not to be presumed, but to justify the submission of that question to a jury, there must be more than a mere surmise that

its railway, have discovered and removed the obstruction prior to the collision.<sup>69</sup> In an action for injury to a passenger, plaintiff makes out a *prima facie* case of negligence by proof that he was a passenger in a car of defendant which collided with another of its cars whereby he sustained injury.<sup>70</sup> Where a passenger riding on the front platform was injured by a collision, an instruction that if he rode on the platform because there was no other place he could recover, but that if they found from all the testimony that there was room inside where the plaintiff could comfortably have stood he could not recover, was held to be no error.<sup>71</sup>

§ 343. **Injuries to passengers in collisions with vehicles.** — A street car company is liable for injuries sustained by a passenger in a collision between the car and a wagon, although the driver of the wagon was negligent, where the brake was defective, and but for that fact the car could and would have been stopped before reaching the wagon.<sup>72</sup> A street car company is liable for injuries to a passenger from collision of a car with a wagon seen by its motorman on the track at a sufficient distance to stop the car or bring it under control, although the person in charge of the wagon makes no attempt to leave the track until the car is so near that a collision cannot then be avoided by putting on the brakes or reversing the motor.<sup>73</sup> A street railroad company may be liable to a passenger for injuries resulting from a collision caused by the

there may have been negligence on the part of the defendant. There must be evidence upon which the jury might reasonably and properly conclude that there was negligence.

69. *Walters v. Seattle R. & S. Ry. Co.*, 45 Wash. 233, 6 St. Ry. Rep. 317, 93 Pac. 419.

70. *Enos v. Rhode Island Suburban Ry. Co.*, 28 R. I. 291, 5 St. Ry. Rep. 820, 67 Atl. 5.

71. *McDade v. Philadelphia Rapid Transit Co.*, 215 Pa. St. 105, 4 St. Ry. Rep. 953, 64 Atl. 327.

72. *Weber v. Metropolitan St. R.*

*Co.*, 47 N. Y. Supp. 812, 22 App. Div. (N. Y.) 628.

73. *Sears v. Seattle Consol. St. R. Co.*, 6 Wash. 227, 33 Pac. 389; *Sweeney v. Kansas City Cable R. Co.*, 150 Mo. 385, 51 S. W. 582, the rule that the motorman or gripman on the car has a right to assume that a wagon on the track will move out of the way, until something appears showing that it cannot move, does not apply to an action by a passenger against the company for injury sustained in a collision with a broken-down wagon on the same track, but

conductor's want of a high degree of care in preventing a collision with a hook and ladder wagon going to a fire, as well as a want of a high degree of care by the gripman, although the negligence of the driver of the wagon may have contributed to the accident.<sup>74</sup> Where within a few feet of the track there was a high wall with an opening in it which had been used for the passage of teams for several years, and a passenger on a car going at full speed was injured by a collision between the car and a truck emerging therefrom, it was held that the question of due care on the part of the company was for the jury, and that the court did not err in declining to instruct the jury that the company was not liable to the passenger by reason of the failure on its part to maintain a flagman, signal device, or other such appliance at the point where teams come upon the track through the opening in said wall.<sup>75</sup> But where, in an action against a street car company for personal injuries sustained by a passenger from a collision between a car and a wagon, it appeared that the wagon was approaching from the direction toward which the car was going, and that because of the heavy load the driver was unable to turn out as quickly as he might ordinarily have done, as a result of which the stanchions in the middle of the car struck the rear bags of cotton with which the wagon was loaded, shattering the handles and injuring plaintiff by the flying splinters, it was held that the situation was not one from which grave injury might have been expected, and hence a charge that the street car company was bound

the passenger, who sees the danger of a collision, has the right to assume that he will be carried safely, and that the gripman or motorman will see the obstruction and stop in time to prevent a collision; *Snediker v. Nassau Elec. R. Co.*, 41 App. Div. (N. Y.) 628, 58 N. Y. Supp. 457, an electric railway company is not chargeable with negligence or liable for injuries sustained by a passenger where the car ran into another thrown upon the track about 150 feet

in front of it because of a collision with a beer wagon, when the motorman applied the brakes and remained at his post, and made every reasonable effort to stop the car.

**74.** *Olsen v. Citizens' Ry. Co.*, 152 Mo. 426, 54 S. W. 470. See *Steele v. Railroad Co.*, 55 S. C. 389, 33 S. E. 509.

**75.** *Chicago City Ry. Co. v. Shreve*, 226 Ill. 530, 5 St. Ry. Rep. 190, 80 N. E. 1049.

to exercise the highest degree of care and skill which human foresight could provide was erroneous.<sup>76</sup> Where in case of an injury from a collision with a vehicle it appears that the speed of the car was not excessive, that the motorman could not have seen the vehicle before it was nearly on the track, and that he then did all that could be done to avoid the collision, a verdict for the company is proper.<sup>77</sup> And where a truck from two to four feet from the track on striking a curve slewed into a slowly moving car injuring a passenger, it was held that the approach of the truck under such circumstances was not such an indication of apparent danger as to charge the employees of the company with the duty of stopping the car.<sup>78</sup> And where at the front end of a car which had stopped to let off passengers a horse and wagon was standing with sufficient space between the car and the wagon for the car to pass, and while in this position the car started to move slowly when the wagon came in contact with the car and broke a window injuring the plaintiff, and it appeared that just after the car started the driver of the horse and wagon started the horse, when for some reason the rear end of the wagon slid over and struck the car thus breaking the window, and there was a conflict of testimony as to the space between the car and the wagon, a direction of a verdict for the plaintiff, leaving to the jury only the question of damages, was held to be erroneous.<sup>79</sup> Again, where as a car was coming to a stop at a street intersection, a horse at-

**76.** *Conway v. Brooklyn Heights R. Co.*, 81 N. Y. Supp. 878; *Alexander v. Rochester City, etc., R. Co.*, 128 N. Y. 13, 27 N. E. 950, where plaintiff was a passenger on one of defendant's street cars, when a wagon loaded with lumber passing along the adjoining track in an opposite direction turned suddenly abreast of the car, and the lumber projected inflicting the injuries complained of, and the car driver applied his brake on seeing the wagon turn, it was held that, irrespective of the rate of speed

at which the car was moving, there was no evidence of negligence imputable to defendant and it was error to submit the case to the jury.

**77.** *Black v. Boston Elev. Ry. Co.*, 187 Mass. 172, 3 St. Ry. Rep. 373, 72 N. E. 970.

**78.** *Freeland v. Brooklyn Heights R. Co.*, 109 App. Div. (N. Y.) 651, 4 St. Ry. Rep. 847, 96 N. Y. Supp. 251.

**79.** *Brower v. Public Service Corp.*, 74 N. J. L. 193, 5 St. Ry. Rep. 710, 64 Atl. 1052.

tached to a wagon thrust his head through the rear window, breaking the glass and frightening the plaintiff, it was held that the doctrine of *res ipsa loquitur* did not apply and that the complaint was properly dismissed.<sup>80</sup>

§ 344. **Injuries to passengers in collisions between cars.** — Where a passenger was injured on a street car which collided with another car while going down a grade, in consequence of the brake chains parting, and the evidence showed that after the chain broke the driver did all that he could to stop the car, remained upon it until it was within four feet of the front car, and there was no evidence that he was unfit to act as driver or did not use proper care, it was held that, while he might have used unnecessary force in applying the brake, the evidence of negligence was not sufficient to go to the jury.<sup>81</sup> And where a passenger seeing a car approaching from the rear fainted from fright and fell to the floor, it was held that the company was not liable, it appearing that the fall was not caused by the collision, which was slight and not felt by the other passengers beyond the sensation of a jar.<sup>82</sup> But a motorman is guilty of negligence rendering the company liable to a passenger injured thereby, in failing to apply the brakes until his car is within twenty or twenty-five feet of another car standing on the same track, when, owing to the rails being slippery, he is unable to stop in time to avoid a collision, where he sees the other car slowing up gradually when it is about fifty feet ahead of him.<sup>83</sup> And where a street car is run upon the track of a steam railroad, directly in front of an approaching train, without any effort to stop the car and without any attempt by the conductor to ascertain whether the way is clear, the street car company is guilty of negligence.<sup>84</sup> And where a passenger in a

80. *Grant v. Metropolitan St. Ry. Co.*, 99 App. Div. (N. Y.) 422, 3 St. Ry. Rep. 711, 91 N. Y. Supp. 202. 185 Mass. 522, 3 St. Ry. Rep. 407, 70 N. E. 1021.

81. *Wynn v. Central Park, etc., R. Co.*, 133 N. Y. 575, 44 St. Rep. (N. Y.) 673, 30 N. E. 721. 83. *Wynne v. Atlantic Ave. R. Co.*, 35 N. Y. Supp. 1034, 70 St. Rep. (N. Y.) 737, 14 Misc. Rep. (N. Y.) 414.

82. *Mullin v. Boston Elev. Ry. Co.*, 84. *Indianapolis Traction & Terminal Co. v. Romans*, 40 Ind. App.

car standing upon a siding is injured by reason of a collision with a car following it, and running on the siding because the switch had not been closed, it was held that it was negligent for the motorman of the second car to approach the switch at a rate of speed which did not permit him to stop the car in case he found the switch open; especially in the absence of testimony that it was the duty of the operators of the first car to close it.<sup>85</sup> A street railroad company is bound to exercise all the care and skill which human prudence and foresight can suggest to secure a passenger's safety at a crossing of a cable road, and a passenger injured by a collision of the horse car, in which he was riding, with a cable car, though the former had the right of way, has a cause of action against the horse car company, if the driver could have observed the insistence of its right of way by the cable car, and by sacrificing his own right could have avoided the accident.<sup>86</sup> An electric railway company is liable for the negligence of an employee intrusted with the management of cars while in the barn, in running a car from the barn to aid another car which has become stalled on the track, with which the forcer car collides, injuring a passenger therein, where the motorman of the latter car acquiesced in the act of such employee in getting the car out.<sup>87</sup> Where an electric railroad ran through woods on a down grade with frequent curves; the tracks were slippery from rains so that the brakes could not hold well; the trolley having slipped, the conductor, knowing that

184, 5 St. Ry. Rep. 219, 79 N. E. 1068.

**85.** *Stevens v. New Jersey & H. R. Ry. Co.*, 74 N. J. L. 237, 6 St. Ry. Rep. 136, 65 Atl. 874.

**86.** *Zimmer v. Third Ave. R. Co.*, 36 App. Div. (N. Y.) 265, 55 N. Y. Supp. 308; *Goorin v. Alleghany Trac. Co.*, 179 Pa. St. 327, 333, 36 Atl. 207, 1129, neither of two street railroad companies is, as matter of law, free from negligence toward a passenger on the car of one of the companies where the cars of the two companies collide at a crossing on a wide, level,

and well-lighted street in full view of each other, although the car first reaching the crossing had the right to cross first; *West Chicago St. Ry. Co. v. Williams*, 87 Ill. App. 548, where a street car on which plaintiff was a passenger collided with a team attached to a beer wagon, there was evidence to sustain the finding of negligence in the gripman in not stopping the car in time to avoid the collision.

**87.** *Quinn v. Shamokin, etc., Car Co.*, 7 Pa. Super. Ct. 19.

another car was coming two minutes behind, stopped his car at a curve where the motorman of the rear car could see only one hundred and fifty feet ahead, and, without warning the approaching car, climbed on top of his car to adjust the trolley, and a collision occurred, it was held that the conductor was negligent.<sup>88</sup> Where plaintiff was injured in a collision between an electric car, on which he was riding, and a car on which the president of the defendant company was riding, and the president knew there was another car out which would come in some time that evening, it was held negligence for him to run his private car at a high rate of speed around a curve, where a coming car could not be seen, or to run it over that part of the road without taking proper precautions to prevent a collision with such incoming car.<sup>89</sup> And where a passenger was injured by a collision between two cars moving in the opposite direction on the same track, it was held that a requested instruction that the mere fact of the collision was not evidence of negligence was properly refused.<sup>90</sup>

**§ 345. — Injuries to passengers in collisions at railroad crossings.** — It is negligence for a street car driver to drive his car onto a railroad crossing without first stopping and looking and listening for trains, except, possibly, where a flagman is kept at the crossing, and the violation by a street car driver of a city ordinance providing that street cars shall come to a complete stop before going onto railroad crossings is negligence.<sup>91</sup> A street railroad company is not relieved from liability for the death of a passenger from a collision at a crossing of a steam railroad, because of the failure of the latter to lower its safety gates, where it has itself failed to comply with a statute requiring it to send a man ahead to see if the crossing can be safely made.<sup>92</sup> The motorman of an

**88.** *Blanchette v. Holyoke St. Ry. Co.*, 175 Mass. 51, 55 N. E. 481.

**89.** *Hennessy v. St. Louis & S. Ry. Co.*, 173 Mo. 86, 73 S. W. 162.

**90.** *Savage v. Marlborough St. Ry. Co.*, 186 Mass. 203, 3 St. Ry. Rep. 406, 71 N. E. 531.

**91.** *Selma St. & Sub. Ry. Co. v.*

*Owen*, 132 Ala. 420, 31 So. 598. See also *West Jersey R. Co. v. Railway Co.*, 52 N. J. Eq. 31, 29 Atl. 423; *Railroad Co. v. Boyer*, 97 Pa. St. 91; *Richmond v. Railroad Co.*, 87 Mich. 374, 49 N. W. 621, where flagman is kept at the crossing.

**92.** *Cincinnati St. R. Co. v. Mur-*

electric car has no right to presume, at the risk of the lives of passengers thereon, that a steam engine which he sees approaching a crossing and liable to reach it about the same time as his car will, will not cross, because it has not given the signals required by statute before crossing a public highway, and any instructions by an electric railroad company to a conductor on a car in regard to his duties in exercising care at a railroad crossing will not relieve the company from liability for an injury caused by a collision at such crossing due to the conductor's negligence.<sup>93</sup> A street railroad company is responsible for injuries received by a passenger at a railroad crossing where a collision occurs with a passing train, when the accident was due to the inexperience of the motorman and the company's failure to provide a conductor to assist in properly applying the back brakes.<sup>94</sup> But an electric street railroad is not liable for injuries to a passenger caused by her jumping from the car under the belief that a collision with a locomotive engine was imminent, where the appearances at the time she jumped did not indicate any danger to the motorman operating the car, and he was exercising reasonable care.<sup>95</sup> And where a motorman of an electric railroad started to cross an intersecting steam railroad after his conductor had used proper care to ascertain that no train was expected, and while crossing at a moderate speed a railroad train rounded the curve at a high rate of speed without warning, and a collision seemed imminent, and the motor-

ray, 9 Ohio C. C. 291, 3 Ohio Dec. 72; West Chicago St. R. Co. v. Martin, 47 Ill. App. 610, a street car company is liable for an injury to a passenger on one of its cars who is not guilty of any negligence, caused by collision with a steam railroad train, where it was the duty of its servants to go forward upon the track of the railroad company at a crossing to a point where they could ascertain whether or not the cars of the railroad company were approaching the crossing, and they failed to do so; Barrett v. Third Ave. R. Co.,

45 N. Y. 628; affg. 31 N. Y. Super. Ct. (1 Sw.) 568, 8 Abb. Pr. N. S. 205, it is no defense that the negligence of a third party contributed to the injury.

**93.** Hammond, Whiting & E. C. Electric Ry. Co. v. Spyzehalski, 17 Ind. App. 7, 46 N. E. 47.

**94.** Flournoy v. Shreveport Belt Ry. Co., 50 La. Ann. 491, 23 So. 465; Russel v. Shreveport Belt Ry. Co., 50 La. Ann. 635, 23 So. 466.

**95.** Dallas Consol. Trac. R. Co. v. Randolph, 8 Tex. Civ. App. 213, 27 S. W. 925.

man instantly applied all power and increased the speed, a verdict attributing negligence to the motorman on these facts, whereby a passenger was thrown to the floor of the car and injured, cannot be sustained.<sup>96</sup> Where a flagman failed to communicate certain instructions received from the train dispatcher, and a collision resulted therefrom, this was held to be negligence of the railroad, as to a passenger injured by the collision.<sup>97</sup>

§ 346. **Movement and speed of cars.** — As a general rule, it may be said that, in the operation of a trolley car, the duty rests upon the motorman to use reasonable care to so regulate the speed at which he runs it as not to jeopardize the safety of the passengers, either in the car which he is operating, or those which happen to be in near proximity to it.<sup>98</sup> Whether the rate of speed at which a street car is traveling is so high as to be dangerous depends very largely upon circumstances. A street car may be propelled at a high rate of speed in the daytime, or along a street that is brilliantly lighted at night, with perfect safety, while the same rate of speed maintained after dark in on unlighted street would be extremely dangerous.<sup>99</sup> Whether the movement or speed of street cars is a negligent act rendering the carrier liable cannot in most cases be determined from the rate of speed alone. Other circumstances must be taken into consideration in relation to which the speed or movement of the car may be a negligent act. Starting a train on an elevated railway, which had stopped at a station, before a passenger was able to leave the doorway because of the absence of the guard whose duty it was to open the door of the car and the gate on the car platform, is evidence of negligence sufficient to go to the jury.<sup>1</sup> So, when it appears that the

96. *Corkhill v. Camden St. Ry. Co.*, 69 N. J. L. 97, 54 Atl. 522.

97. *Harris v. Puget Sound Electric Ry.*, 52 Wash. 289, 6 St. Ry. Rep. 674, 100 Pac. 838.

98. *Stevens v. New Jersey & H. R. Ry. Co.*, 74 N. J. L. 237, 6 St. Ry. Rep. 136, 65 Atl. 874.

99. *Chicago City Ry. Co. v. Bennett*, 214 Ill. 76, 3 St. Ry. Rep. 139, 73 N. E. 343.

1. *Baker v. Manhattan Ry. Co.*, 118 N. Y. 533, 29 St. Rep. (N. Y.) 936.

A witness who sees a moving car and possesses a knowledge of time

plaintiff was about to step from a moving electric car which had slackened its speed in response to a signal from him, but had not quite stopped, when it was started forward with a violent jerk in obedience to a signal from the conductor.<sup>2</sup> Or, backing up a car for the accommodation of passengers to be transferred from another car, without having an employee at the rear end, where it is customary for passengers to walk along the track to a point where the transfer car ordinarily stands, but owing to the deep snow which forms a bank several feet high on either side of the track, the usual rule is not followed.<sup>3</sup> Where a passenger, while riding on the platform of a motor car, falls off while the car is rounding a curve, the mere fact that the car was running at a high rate of speed does not show negligence on the part of the company, unless the speed was unusual, improper, or dangerous.<sup>4</sup> Where a rule of the company requiring a car approaching a car discharging passengers to slow up was violated, and a passenger who alighted from a motor car and passed around its rear was struck, the car colliding with him being concealed from his view and approaching at full speed, without signal or warning of its approach, the evidence was held sufficient to sustain a finding that the motorman was negligent.<sup>5</sup> Although negligence in the operation of a street car in respect to the rate of speed may be established, where a passenger alights from a street car, and, passing behind it, is immediately struck by a car coming in an opposite direction, just as he steps on the latter's track, he does not show

and distance is competent to express an opinion as to the rate of speed at which a car is moving. *Coffey v. Omaha & C. B. St. Ry. Co.*, 79 Neb. 286, 6 St. Ry. Rep. 806, 112 N. W. 589; *Lindgren v. Omaha St. Ry. Co.*, 73 Neb. 628, 4 St. Ry. Rep. 680, 103 N. W. 307; *Omaha St. Ry. Co. v. Larson*, 70 Neb. 591, 2 St. Ry. Rep. 654, 97 N. W. 824.

2. *Walters v. Collins Park & B. R. Co.*, 95 Ga. 519, 5 Am. Electl. Cas. 387, 20 S. E. 497; *Sirk v. Marion St.*

*Ry. Co.*, 11 Ind. App. 680, 5 Am. Electl. Cas. 394, 39 N. E. 421.

3. *Cameron v. Union Trunk Line*, 10 Wash. 507, 39 Pac. 128, 5 Am. Electl. Cas. 388.

4. *Francisco v. Troy & L. R. Co.*, 78 Hun (N. Y.) 13, 29 N. Y. Supp. 247, 5 Am. Electl. Cas. 374.

5. *Dobert v. Troy City R. Co.*, 91 Hun (N. Y.) 28, 36 N. Y. Supp. 105, 71 St. Rep. (N. Y.) 392; *Stevens v. Union Ry. Co.*, 75 App. Div. (N. Y.) 602, 78 N. Y. Supp. 624; *Pelletreau*

absence of contributory negligence by the mere fact that he “looked up” before stepping on the track and perceived no car, nor was his failure to look for an approaching car negligence *per se*. Although the rule is settled that the absence of contributory negligence may be affirmatively established by circumstances no less than by direct proof, and that, if different conclusions can be drawn from circumstances, the question is one for the jury, the circumstances of such a case fairly warrant only one conclusion, and that is that he would have escaped injury if he had exercised the ordinary care of a prudent person.<sup>6</sup> But, when plaintiff alighted at night from a street car at a station for passengers, but not at the intersection of any street, and, in starting to cross a parallel track, was struck and injured by a car running at a high rate of speed, on a down grade, in the opposite direction, the car from which plaintiff alighted obstructing the view of the approaching car, it was held that, since a street railway company is not justified in running its cars at a high speed past a car standing on a parallel track to allow passengers to alight, who might cross to either side of the street, its act in so doing rendering the place appointed for passengers to alight dangerous, so far excuses the plaintiff’s failure to observe the approaching car as to require the submission of his negligence to the jury.<sup>7</sup> To propel an electric car over an uneven track at such a speed as to cause it to sway and plunge and thereby bring the head of a passenger, who had risen to signal the conductor, against a trolley pole standing two feet from the open car, or to drive it at a high or unusual rate of speed upon a down grade upon a switch or in approaching a switch, known by the driver to be dangerous, constitutes negligence.<sup>8</sup> The

v. Met. St. Ry. Co., 77 N. Y. Supp. 386, 74 App. Div. (N. Y.) 192.

6. Landrigan v. Brooklyn Heights R. Co., 23 App. Div. (N. Y.) 43, 48 N. Y. Supp. 454; Bass’ Adm’r v. Norfolk Ry. & L. Co., 3 Va. Sup. Ct. Rep. 571, 40 S. E. 100.

See sections 363–367, herein, as to contributory negligence in such cases.

7. Wise v. Brooklyn Heights R. Co., 46 App. Div. (N. Y.) 246, 61 N. Y. Supp. 530.

8. Schmidt v. Coney Island, etc., R. Co., 26 App. Div. (N. Y.) 391, 49 N. Y. Supp. 777; Seelig v. Met. St. R. Co., 41 N. Y. Supp. 656, 18 Misc. Rep. (N. Y.) 383; Maguire v. Railroad Co., 115 Mass. 239.

defendant cannot complain of an instruction that "negligence could not be predicated upon the mere question of speed, unless speed was one of the elements that helped to cause the accident," as speed might be an element of negligence, in connection with the sudden stopping of the car.<sup>9</sup> Where a passenger is injured by falling from the front platform of a street car, he cannot recover damages merely on proof that the driver whipped up his horses, and that they made a sudden "plunge," which caused the car to "lurch;" nor on proof that an electric car gave a sudden jerk and threw him off, while he was sitting in a seat facing the front of the car.<sup>10</sup> The motorman is guilty of negligence in permitting his car to run at a high rate of speed while approaching the crossing of two streets in a populous part of the city and when about to pass another car on that side from which passengers are liable to alight.<sup>11</sup> When there is conflicting evidence as to the rate of speed, or it appears that if the car had continued at an ordinary rate of speed the accident would not have occurred, the questions of negligence and contributory negligence are for the jury.<sup>12</sup>

**§ 347. Violation of statutes or ordinances limiting the rate of speed.** — There is no established rule generally accepted by the courts to determine the legal effect, as evidence, of the violation of a statute or ordinance limiting the rate of speed of steam cars or street cars passing through the streets of municipal corporations. In some States a violation of such a regulation or ordinance is held to be conclusive evidence of negligence.<sup>13</sup> In other

9. *Murray v. Brooklyn City R. Co.*, 7 N. Y. Supp. 900, 27 St. Rep. (N. Y.) 280.

10. *Cassidy v. Atlantic Ave. R. Co.*, 9 Misc. Rep. (N. Y.) 275, 29 N. Y. Supp. 724; *Brennan v. Brooklyn Heights R. Co.*, 12 Misc. Rep. (N. Y.) 570, 33 N. Y. Supp. 852, 5 Am. Electl. Cas. 416.

11. *Fonda v. St. Paul City R. Co.*, 71 Minn. 438, 74 N. W. 166.

12. *Hooper v. United Trac. Co.*, 17 Pa. Super. Ct. 638; *Hamilton v. Consol. Trac. Co.*, 201 Pa. St. 351, 50 Atl. 946; *Chisholm v. Seattle Elec. Co.*, 27 Wash. 237, 67 Pac. 601.

13. *Connecticut*. — See *Broschart v. Tuttle*, 59 Conn. 1, 21 Atl. 925, 11 L. R. A. 333, holding that the violation by plaintiff of an ordinance regulating speed is a bar to his right of recovery for the negligence of another.

States it is held that it is not.<sup>14</sup> In other cases it is said speed of a car in excess of that prescribed by law is evidence of negligence.<sup>15</sup> In New York it is now held that irrespective of any

*Georgia.* — Atlanta & West Point Ry. Co. v. Wyly, 65 Ga. 120.

*Iowa.* — Correll v. Baltimore, etc., R. Co., 38 Iowa 120:

*Maryland.* — Baltimore City Pass. Ry. Co. v. McDonnell, 43 Md. 534.

*Missouri.* — Weber v. Kansas City Cable R. Co., 100 Mo. 194, 12 S. W. 804, 13 S. W. 587; Keim v. Union Ry. & Trans. Co., 90 Mo. 314, 2 S. W. 427; Liddy v. St. Louis R. Co., 40 Mo. 506; Campbell v. St. Louis Transit Co., 121 Mo. App. 406, 5 St. Ry. Rep. 685, 99 S. W. 58; Deitring v. St. Louis Transit Co., 109 Mo. App. 524, 3 St. Ry. Rep. 580, 85 S. W. 140; Klob v. St. Louis Transit Co., 102 Mo. App. 143, 2 St. Ry. Rep. 611, 76 S. W. 1050.

*Texas.* — Dallas Consol. Elec. St. Ry. Co. v. Ison, (Tex. Civ. App.) 3 St. Ry. Rep. 851, 83 S. W. 408.

**14.** Grand Trunk Ry. Co. v. Ives, 144 U. S. 408, 418, 12 S. Ct. 679; Indianapolis & St. L. R. Co. v. Peyton, 76 Ill. 341; Ford's Adm'r v. Paducah City Ry., 30 Ky. L. Rep. 644, 5 St. Ry. Rep. 337, 99 S. W. 355; Hall v. Ripley, 119 Mass. 135; Hanlon v. South Boston R. Co., 129 Mass. 310; Steele v. Burkhardt, 104 Mass. 59, 6 Am. Rep. 191; Wright v. Malden & Melrose R. Co., 4 Allen (Mass.) 283.

Wosika v. St. Paul City Ry. Co., 80 Minn. 364, 83 N. W. 386, holding where there was no evidence that plaintiff, injured by collision with a street car, drove on the track at a rate in violation of a city ordinance, there was no error in excluding the ordinance. See also Faber v. St.

Paul, M. & N. Ry. Co., 29 Minn. 467, 13 N. W. 902.

**Running railway trains in an inhabited locality** at a rate of speed exceeding that allowed by law may be negligent. Chicago, etc., R. Co. v. Becker, 84 Ill. 483; Cowell v. Burlington, etc., R. Co., 38 Iowa 120, 18 Am. Rep. 22; Phila., etc., R. Co. v. Stebbing, 62 Md. 504. Where there is no law regulating the speed, the question of negligence is for the jury. Penna. R. Co. v. Lewis, 79 Pa. St. 33; Burlington, etc., R. Co. v. Wendt, 12 Neb. 76; Salter v. Utica R. Co., 88 N. Y. 42; Baltimore, etc., R. Co. v. State, 62 Md. 479; Myers v. Chicago, etc., R. Co., 57 Iowa 556, 42 Am. Rep. 50. See also Mittlestadt v. Morrison, 76 Wis. 265, 44 N. W. 1103; Mueller v. Milwaukee St. Ry. Co., 86 Wis. 340, 56 N. W. 914; Campbell v. St. Louis & Suburban Ry. Co., 1 St. Ry. Rep. 475, 175 Mo. 161, 75 S. W. 86.

**15.** *Alabama.* — Highland Ave. & B. R. Co. v. Sampson, 112 Ala. 425, 20 So. 566.

*Montana.* — Wall v. Helena St. R. Co., 12 Mont. 44, 29 Pac. 721, 20 Am. & Eng. R. Cas. 474.

*New York.* — Beiseigel v. New York Cent. R. Co., 14 Abb. Prac. N. S. 29.

*North Carolina.* — Davis v. Durham Traction Co., 141 N. C. 832, 4 St. Ry. Rep. 880, 53 S. E. 617.

*Rhode Island.* — Oates v. Union R. Co., 27 R. I. 499, 4 St. Ry. Rep. 981, 63 Atl. 675.

*Utah.* — Hall v. Ogden St. R. Co., 13 Utah 243, 6 Am. Electl. Cas. 598,

law regulating the speed of railroad trains or cars at street crossings, running at an excessive rate of speed is negligence. Whether the rate of speed is excessive or dangerous in the locality is a question of fact for the jury, and a violation of a city ordinance limiting the rate of speed is evidence of negligence to be considered by the jury in connection with the other evidence.<sup>16</sup> In Nebraska it is held that the violation of any statutory or valid municipal regulation as to the speed of street cars is such a breach of duty as may be made the foundation of an action by a person sustaining special damages, where the other elements of actionable negligence concur; and this rule is of especial application to cars propelled by electricity.<sup>17</sup> Running an electric car at an excessive rate of speed in violation of a city ordinance has been held to be negligence where it was also in evidence that, if the car had been running at the rate of speed required by the ordinance, there would have been no collision, and the plaintiff entitled to recover

44 Pac. 1046, 4 Am. & Eng. R. Cas. N. S. 77.

**16.** *Knuffle v. Knickerbocker Ice Co.*, 84 N. Y. 488. In *Massoth v. Delaware & Hudson Canal Co.*, 64 N. Y. 524, 533, the court reviews the decision in *Brown v. Buffalo & State Line R. Co.*, 22 N. Y. 191, that a city ordinance regulating the speed of trains was not admissible in evidence, for any purpose, in an action against a railroad corporation for negligently causing the death of an individual, and the cases of *Jetter v. New York & H. R. Co.*, 2 Abb. Ct. App. 458, 2 Keyes (N. Y.) 154; *Beiseigel v. N. Y. Cent. R. Co.*, 14 Abb. Pr. N. S. (N. Y.) 29, overruling the same, *Newsone v. N. Y. Cent. R. Co.*, 29 N. Y. 383; *Lane v. Atlantic Works*, 111 Mass. 136; *Wilds v. Hudson River R. Co.*, 29 N. Y. 315, and *McGrath v. N. Y. Cent. R. Co.*, 63 N. Y. 522, and says: "Whether a violation of an ordinance regulating

speed is necessarily an act of negligence, or such a wrongful act in violation of law as legally to charge the defendant with any injuries resulting from such act, may be regarded as an open question in this State. The actual decisions in this State have only gone to the extent of showing that city ordinances or this character are competent evidence upon the question of negligence, and with proof of a greater rate of speed than that prescribed, proper, with all the other evidence in the case, to be submitted to the jury for their consideration. It has not been necessary in any case, in which the question has arisen, to go farther." *Wasmer v. Delaware, L. & W. R. Co.*, 80 N. Y. 212, 36 Am. Rep. 608.

**17.** *Omaha St. R. Co. v. Duvall*, 40 Neb. 29, 58 N. W. 531, 5 Am. Electl. Cas. 502, followed in *Lincoln Traction Co. v. Duvall*, (Neb.) 3 St. Ry. Rep. 582, 100 N. W. 197.

though he failed to look before crossing the track.<sup>18</sup> But the mere fact that a street car is running in excess of the rate permitted by ordinance will not entitle an injured party to go to the jury on the question of negligence, where there is no evidence showing that the motorman could have avoided the injury if the speed had been within the permitted rate.<sup>19</sup> A limitation by city ordinance of the rate of speed at which street cars may be run is not authority to run up to the limit regardless of existing circumstances and conditions.<sup>20</sup> Even a less rate of speed than that prescribed by an ordinance may be negligent in view of the particular conditions and circumstances.<sup>21</sup> A passenger has the right to presume that a street railway company will comply with the law, and that the speed of the car will not exceed that allowed by law.<sup>22</sup> Violation of a city ordinance requiring drivers of street cars to keep a lookout for all teams, persons, and obstructions on the track and to stop the cars after the first appearance of danger, is negligence *per se*.<sup>23</sup>

**§ 348. Curves and speed thereon.** — A street car company is not liable for the injury of a passenger by being thrown from the car by its lurching and jerking in going around a curve, although the car is running at a high speed, if the car is run by a cable and it is necessary to propel the car around the curve by the momentum previously acquired, and everything is done which human prudence, care, and foresight could suggest in order to prevent injuries to passengers;<sup>24</sup> and the fact that persons are not ordinarily thrown from their seats in such a car in rounding a curve does not justify the presumption, where a person was so injured,

**18.** *Hays v. Tacoma Ry. & Power Co.*, (U. S. C. C., Wash.) 106 Fed. 48.

**19.** *Molyneaux v. S. W. Mo. Elec. Ry. Co.*, 81 Mo. App. 25.

**20.** *Quincy Horse R. & C. Co. v. Gnuse*, 38 Ill. App. 212; *Story v. St. Louis Transit Co.*, 108 Mo. App. 424, 3 St. Ry. Rep. 574, 83 S. W. 992.

**21.** *Holden v. Missouri Ry. Co.*,

177 Mo. 456, 2 St. Ry. Rep. 573, 76 S. W. 973.

**22.** *Capital Traction Co. v. Brown*, 35 Wash. L. Rep. 306, 5 St. Ry. Rep. 99.

**23.** *Memphis St. Ry. Co. v. Haynes*, 112 Tenn. 712, 3 St. Ry. Rep. 809, 81 S. W. 374.

**24.** *Hite v. Met. St. R. Co.*, 130

that the injury was chargeable to the want of care.<sup>25</sup> It is the duty of a railway company to use the highest degree of care and skill in the means which the law authorizes it to employ; to see to it that the people who ride in its cars are not subjected to any danger arising from the means of propulsion which can be obviated; if it is necessary to send cars around a curve at a high rate of speed, to see to it that the passengers are put in such position that they are not likely to suffer danger or accident from such a rate of speed, or give such warning on the approach to the curve that they may be enabled to protect themselves. It owes them the duty of carrying them in safety over its lines, provided always, that the passenger has been guilty of no neglect contributing to the accident. In an action for personal injuries the burden is on the plaintiff to show affirmatively either by direct proof or by facts and circumstances from which the inference may be properly drawn, that his own negligence did not contribute directly to the accident complained of.<sup>26</sup> Where a person is injured by being thrown from the platform of a car as it is rounding a curve, it is incumbent upon him in an action to recover for such injury to prove that he was thrown from the car by reason of some unusual movement, caused by its negligent operation.<sup>27</sup> In order to maintain an action against a street railway company for injuries to a passenger alleged to have been caused by being thrown from a car while passing a curve, it must appear that the lurch or jolt was more than is ordinarily to be expected, and that it was due to a defect in the car or track, a negligent or dangerous rate of speed, or some other cause for which the defendant can be held responsible.<sup>28</sup> The fact that employees of a street railway company violated rules limiting the speed around curves is a circum-

Mo. 132, 31 S. W. 262, 51 Am. St. Rep. 555.

**25.** *Wilder v. Met. St. R. Co.*, 10 App. Div. (N. Y.) 364, 41 N. Y. Supp. 931; *affd.*, 161 N. Y. 665, 57 N. E. 1128.

**26.** *Bruce v. Brooklyn Heights R. Co.*, 68 App. Div. (N. Y.) 242, 74

N. Y. Supp. 324; *Chisholm v. State*, 141 N. Y. 246, 36 N. E. 184.

**27.** *Kiefer v. Brooklyn Heights R. Co.*, 111 App. Div. (N. Y.) 404, 4 St. Ry. Rep. 843, 97 N. Y. Supp. 841.

**28.** *Partelow v. Newton & B. St. Ry. Co.*, 196 Mass. 24, 6 St. Ry. Rep. 186, 81 N. E. 894.

stance to be considered in passing upon the negligence of the defendant's servants.<sup>29</sup> There is no such probability of a passenger being thrown bodily from his seat in going around a curve as to require the company, in the exercise of the degree of care required of it, to adopt a rule requiring a rail on such side to be down so as to insure a passenger being held in his seat.<sup>30</sup> Where a car is run at an excessive rate of speed in rounding a curve causing a passenger to be thrown from the car, the company will be loable.<sup>31</sup> And to run a car around a curve at such a high rate of speed as to throw passengers from their seats is negligence.<sup>32</sup> In an action by a passenger against a street railway company to recover for injuries alleged to have been caused by being thrown from a car passing a curve at excessive speed, it was held that the question of the defendant's negligence was for the jury.<sup>33</sup>

§ 349. *Curves and speed thereon — Decisions.* — Where plaintiff was injured by an electric car jumping the track at a slight curve, which it was claimed was caused by running at great speed in the absence of a flange or guard rail at that point, evidence of a previous derailment, not shown to have been at the same place and under the same condition as the accident complained of, was neither competent to prove that the place was "obviously" dangerous, nor that the defendant had notice of the alleged defect, in the absence of evidence that a flange or guard rail was necessary or usual on such a slight curve.<sup>34</sup> Where a passenger on a street car was authorized to assume that the car would stop before rounding a curve and after signaling the conductor to stop, and the conductor having signaled the motorman, the plaintiff started

**29.** *Partelow v. Newton & B. St. Ry. Co.*, 196 Mass. 24, 6 St. Ry. Rep. 186, 81 N. E. 894.

**30.** *Dolphin v. Worcester Consolidated St. Ry. Co.*, 189 Mass. 275, 4 St. Ry. Rep. 472, 75 N. E. 635.

**31.** *Spooner v. Old Colony St. Ry. Co.*, 190 Mass. 132, 4 St. Ry. Rep. 431, 70 N. E. 660; *Brierly v. Union*

*R. Co.*, 26 R. I. 119, 3 St. Ry. Rep. 807, 58 Atl. 451.

**32.** *McEwen v. Atlanta R. & P. Co.*, 120 Ga. 1003, 3 St. Ry. Rep. 83, 48 S. E. 391.

**33.** *Partelow v. Newton & B. St. Ry. Co.*, 196 Mass. 24, 6 St. Ry. Rep. 186, 81 N. E. 894.

**34.** *Morrow v. Westchester Elec.*

to cross the platform and was thrown from the car and injured, while the car rounded the curve at a high rate of speed, the evidence tended to establish negligence and a motion for nonsuit was properly denied.<sup>35</sup> Where a street railway company permits a passenger to ride on the platform of a crowded car and collects his fare, it is liable to him for an injury occasioned by running such car around a curve, without warning, at such speed that the passenger, while in the exercise of due care, has his hands wrenched from the railing and is thrown into the street.<sup>36</sup> Where a boy six years of age was upon the lower step at the forward end of one of the defendant's cars as it was coming around a curve, and was clinging to the step attempting to get himself into a secure position, and notwithstanding this fact the motorman, seeing the boy's danger, turned on the power in a wanton and reckless way, resulting in throwing the boy and injuring him, it was held that although the boy might have failed to have exercised ordinary care for his own safety, the company was liable, in view of the reckless omission of duty on the part of the motorman.<sup>37</sup> Where a person was passing from one car to another in pursuance of a direction so to do by the conductor, and was thrown from the car as it rounded a curve, it was held that it was the duty of the conductor to inform the passenger of the danger in making the turn, or to so have controlled the car that there would have been no danger.<sup>38</sup> When plaintiff was injured by being thrown from a street car which left the track while going around a curve at a prohibited rate of speed, the flange on the car wheel breaking, the question of whether or not the excessive speed was the proximate cause of the injury was for the jury.<sup>39</sup> An electric railway is not, as a matter

Ry. Co., 30 Misc. Rep. (N. Y.) 694, 63 N. Y. Supp. 16; *affd.*, 54 App. Div. (N. Y.) 592, 67 N. Y. Supp. 21.

**35.** *Babeock v. Los Angeles Trac. Co.*, 128 Cal. 173, 60 Pac. 780.

**36.** *Lucas v. Met. St. R. Co.*, 56 App. Div. (N. Y.) 405, 67 N. Y. Supp. 833.

**37.** *Allen v. Holyoke St. Ry. Co.*, 184 Mass. 269, 2 St. Ry. Rep. 416, 68 N. E. 238.

**38.** *Chicago City Ry. Co. v. McCaughna*, 216 Ill. 202, 4 St. Ry. Rep. 188, 74 N. E. 819.

**39.** *Johnsen v. Oakland, S. L. & H. Electric R. Co.*, 127 Cal. 608, 60 Pac. 170.

of law, free from negligence in running a car, the rear platform of which is crowded with passengers, at the rate of fifteen or twenty miles an hour around a sharp curve.<sup>40</sup> But a street railway company is only liable for an injury to a passenger through the motion of an electric trolley car in passing around a curve, when the speed was excessive and more electric power was employed than was necessary to properly drive the car around the curve.<sup>41</sup> The fact that a passenger is standing upon the front platform or steps of a street car, and thus exposed to the danger of being thrown off by the sudden striking of the car, in rapid motion, against a temporary turnout, or by the sudden lurch of the car in turning a curve, requires the driver or motorman, receiving the plaintiff as passenger and permitting him so to stand on the platform or steps, or advised of the situation, and having the car under control, to use reasonable care for the safety of the passenger and that he be not exposed to unnecessary danger.<sup>42</sup> And the company is liable if he is thrown off while the car is rounding a curve by the negligence of the persons in charge of the car in failing to slacken or check the speed in approaching the curve.<sup>43</sup> Where a boy seven years of age sitting at the end of the seat next to his mother in a summer car was thrown from the car as it rounded a curve at a high rate of speed and was run over and killed, it was held that there was no contributory negligence on the part of the mother in permitting the boy to occupy such seat,

**40.** *Reber v. Pittsburg, etc., Trac. Co.*, 179 Pa. St. 339, 36 Atl. 245.

**41.** *Ayers v. Rochester Ry. Co.*, 156 N. Y. 104, 50 N. E. 960; *South Covington & C. St. Ry. Co. v. Constans*, 1 St. Ry. Rep. 242, notes 25 Ky. L. Rep. 158, 74 S. W. 705.

See note 1 St. Ry. Rep. 242.

**42.** *Shaefer v. Union Ry. Co.*, 29 App. Div. (N. Y.) 261, 51 N. Y. Supp. 431; *Dillon v. Forty-second St., etc., R. Co.*, 28 App. Div. (N. Y.) 404, 51 N. Y. Supp. 145.

**43.** *Brusch v. St. Paul City R.*

*Co.*, 52 Minn. 512, 55 N. W. 57; *Blondel v. St. Paul City R. Co.*, 66 Minn. 284, 68 N. W. 1079, 6 Am. & Eng. R. Cas. N. S. 272, the passenger has the right to assume that speed will be slackened before reaching the curve; *East Omaha St. Ry. Co. v. Godola*, 50 Neb. 906, 70 N. W. 491, 6 Am. Electl. Cas. 424; *Lansing v. Coney Island, etc., R. Co.*, 16 App. Div. (N. Y.) 146, 45 N. Y. Supp. 120, where plaintiff, a child seven years old, was placed by her father on the seat of defendant's car, which had stopped

it being declared that where a passenger is in his proper place in the car and makes no exposure of his person to danger there can be no question of contributory negligence.<sup>44</sup> Where one, intending to become a passenger, stepped on the running-board of an open car of an electric street railroad, going north, and while on the running-board, while the car was rounding a curve, was struck by a passing car on the other track, going south, which by reason of the curve projected too close to the north-going car, the questions as to the negligence of the street car company, and the contributory negligence of plaintiff are for the jury.<sup>45</sup> Where cars were passing at a rapid rate of speed on a curve, and there was evidence of a shock of a collision, and a passenger was injured by broken glass, the company was held liable.<sup>46</sup> But where a passenger on a platform resting his hand on a stanchion, received an injury to the hand by the coming together of his car with the adjoining car in rounding a curve, there was held to no imputation of negligence on the part of the company.<sup>47</sup>

**§ 350. Stairways, halls, platforms, and approaches to cars. —**

The rule in relation to the liability of railroad corporations for injuries sustained by passengers by reason of defects in the approaches to the cars, such as platforms, halls, stairways, and the like, differs from that which obtains in the case of an injury to a passenger while he is being carried over the road of the corporation and where the injury occurs from a defect in the roadbed or machinery, or in the construction of the cars, or where it results from a defect in any of the appliances, such as would be likely to occasion great danger and loss of life to those traveling on the road. The rule in the former case is that the carrier is bound

on a curve, and when it started, before he had time to take his seat, plaintiff fell off.

**44.** Indianapolis Traction & Terminal Co. v. Beckman, 40 Ind. App. 100, 5 St. Ry. Rep. 278, 81 N. E. 82.

**45.** Hollingsworth v. Cincinnati

St. Ry. Co., 21 Ohio C. C. 536, 12 O. C. D. 100.

**46.** Binsbacher v. St. Louis Transit Co., 108 Mo. App. 1, 3 St. Ry. Rep. 565, 82 S. W. 546.

**47.** Gott v. Brooklyn Heights R. Co., 110 App. Div. (N. Y.) 18, 4 St. Ry. Rep. 846, 96 N. Y. Supp. 945.

simply to exercise ordinary care in view of the danger to be apprehended, and for the reason that the consequence of a neglect of the highest care and skill which human foresight can attain to are naturally of a much less serious nature.<sup>48</sup> And a railway company which, though not strictly in control of a station, but using it under a lease, uses it for its own benefit and invites passengers to enter it, may be held responsible to the latter for an injury caused by failure to make proper rules regarding its use.<sup>49</sup> A railroad company which uses as a station for embarking or disembarking its passengers a pavilion constructed upon a street, is liable to a passenger for injuries received from the breaking of a rotten plank in the steps leading to the cars, whether the station was constructed by it or not. It is liable as a licensee.<sup>50</sup> And where a passenger was injured by the falling of a station platform

**48. Indiana.** — *Pennsylvania Co. v. Marion*, 104 Ind. 239, 3 N. E. 874.

**Massachusetts.** — *Moreland v. B. & P. R. Co.*, 141 Mass. 31, 6 N. E. 225.

**Michigan.** — *McKone v. Michigan C. R. Co.*, 51 Mich. 601.

**Minnesota.** — *Bannerman v. Q. P.*, etc., R. Co., 32 Minn. 340.

**Missouri.** — *St. Louis, etc., R. Co. v. Fairbairn*, (Mo.) 4 S. W. 50; *Moore v. W.*, etc., R. Co., 84 Mo. 481.

**New York.** — *Kelly v. Manhattan Ry. Co.*, 112 N. Y. 443, 20 N. E. 383; *Weston v. N. Y. El. R. Co.*, 73 N. Y. 595; *McMahon v. N. Y. El. R. Co.*, 50 N. Y. Super Ct. 507; *Laffin v. Buffalo & S. W. R. Co.*, 106 N. Y. 136, 60 Am. Rep. 433, 12 N. E. 599; *Morris v. N. Y. Cent. etc., R. Co.*, 106 N. Y. 678, 13 N. E. 455; *Palmer v. Pennsylvania Co.*, 111 N. Y. 488, 18 N. E. 859; *Unger v. Forty-Second St. R. Co.*, 51 N. Y. 497; *Flagg v. Manhattan R. Co.*, 49 N. Y. Super. Ct. 251; *Timpson v. Manhattan R. Co.*, 52 Hun (N. Y.) 489, 5 N. Y. Supp. 684; *Ryan v. Manhattan R. Co.*, 121 N. Y. 126, 23 N. E. 1131;

*Hanrahan v. Manhattan R. Co.*, 53 Hun (N. Y.) 420, 6 N. Y. Supp. 395; *Johnson v. Manhattan R. Co.*, 52 Hun (N. Y.) 111, 4 N. Y. Supp. 848; *Palmer v. D. & H. C. Co.*, 120 N. Y. 177, 24 N. E. 302.

**Ohio.** — *P. F. W.*, etc., Co. v. *Bingham*, 29 Ohio St. 374.

**Vermont.** — *Beard v. C.*, etc., R. Co., 48 Vt. 101.

See *Moore on Carriers*, pp. 612 *et seq.*

**49. Kuhlen v. Boston & N. St. Ry. Co.**, 193 Mass. 341, 5 St. Ry. Rep. 385, 79 N. E. 815.

**50. Leveret v. Shreveport Belt Line Co.**, 1 St. Ry. Rep. 253, 110 La. 399, 34 So. 579; *Collins v. Railway Co.*, 80 Mich. 390, 45 N. W. 178; *Chance v. Railway Co.*, 10 Mo. App. 351. In an action for injuries to a passenger by stepping on a defective plank in a platform, in the absence of a plea of contributory negligence, evidence tending to show that plaintiff stepped on the platform on a weak limb, and was careless in so doing was inadmissible. *Bailey v.*

on which she was about to transfer from one car to another owing to the company having allowed the timbers to become rotten, the company was held liable.<sup>51</sup> There is a continuing duty on the part of a railway company owning and maintaining a platform to maintain it in a safe condition, and this involves the duty of inspection from time to time to see that it is safe for the use of the passengers.<sup>52</sup> As a general rule, when an appliance, or machine, or structure, not obviously dangerous has been in daily use for years, and has uniformly proved adequate, safe, and convenient, its use may be continued without imputation of culpable imprudence or carelessness.<sup>53</sup> And where an accident is not the reason-

Seattle & R. Ry. Co., 32 Wash. 640, 73 Pac. 679.

See note, 1 St. Ry. Rep. 25.

51. Wood v. Metropolitan St. Ry. Co., 181 Mo. 433, 3 St. Ry. Rep. 540, 81 S. W. 152.

52. Wood v. Metropolitan St. Ry. Co., 181 Mo. 433, 3 St. Ry. Rep. 540, 81 S. W. 152.

53. Laffin v. Buffalo & S. W. R. Co., 106 N. Y. 136, 141, 60 Am. Rep. 433, 12 N. E. 599, so held where plaintiff, in attempting to step from a car to a station platform, fell between it and the car and was injured. The platform had been used for many years by passengers, and no one but plaintiff had been injured or had suffered any inconvenience on account of the distance between the platform and the cars. It did not appear but that the platform was constructed in the ordinary way, or that the space between it and the car was more than was required, and there was no complaint that the platform was improperly constructed or out of repair. See also Louisville, etc., R. Co. v. Hall, 87 Ala. 708, 6 So. 277, 13 Am. St. Rep. 89. In an action to recover for injuries to plaintiff, a passenger

on defendant's road, received in alighting from one of its cars by slipping between the platform of the car and that of the station, plaintiff claimed that the defendant had so negligently constructed its road as to leave a space between the platform and cars greater than was necessary for the operation of the road. Plaintiff was allowed to prove, under objection and exception, the happening of similar accidents at other stations upon said road without giving evidence tending to show that the conditions were similar. Held error. Brady v. Met. Ry. Co., 127 N. Y. 46. It seems that the evidence would have been competent, if evidence had been first adduced to show that the conditions were similar. Id.

**The mere existence of an opening** between a car upon the Brooklyn bridge and the platform is not of itself negligence which will entitle a passenger to recover for injuries sustained by being pushed and falling into such opening, where, since the construction of the bridge, not one of the large number of persons passing over it has been injured by reason thereof. Fox v. New York, 70

able, natural, and probable result of the situation, which ought to have been foreseen by the defendant in the exercise of the degree of care exacted from a carrier of passengers, no liability follows.<sup>54</sup> If a passenger takes a position carelessly against a door of a car which is liable to be opened at any time, he is guilty of contributory negligence, and cannot recover for injuries sustained by falling out of the car because the door is suddenly opened, although the employee who opened it was also negligent in not observing his position and warning him of it and waiting for him to move.<sup>55</sup> An elevated railway company is not, as matter of law, free from negligence in leaving an open space of twenty-six inches between its cars and the railway around its platform, and its negligence is not excused by the mere fact that other elevated roads have been equally negligent.<sup>56</sup> But the fact that the platform of a railroad station was fourteen inches below the step of a car and six inches distant from such step horizontally does not alone establish negligence upon the part of the company, which will render it liable

Hun (N. Y.) 181, 24 N. Y. Supp. 43, 53 St. Rep. (N. Y.) 902.

**54.** *Fahner v. Brooklyn Heights R. Co.*, 1 St. Ry. Rep. 629, and notes, 86 App. Div. (N. Y.) 488, 83 N. Y. Supp. 815, so held where plaintiff was injured in passing through a doorway in which the defendant maintained two swinging doors, the upper half of which was of glass panels. The plaintiff in passing through the doorway was preceded by a passenger who permitted one of the doors to fly back in the face of the plaintiff. The plaintiff, to protect himself, uplifted his arms, which passed through the glass in the doors and he was seriously cut. It appeared that these doors were of the same general character as those commonly used in public places; that they had been generally used by the defendant for a number of years and that never before

had a passenger been injured by the breaking of the glass panels. *Ayers v. Rochester Ry. Co.*, 156 N. Y. 104, 108, 50 N. E. 960; *Dougan v. Champlain Transp. Co.*, 56 N. Y. 1; *Loftus v. Union Ferry Co. of Brooklyn*, 84 N. Y. 455; *Cleveland v. New Jersey Steamboat Co.*, 125 N. Y. 299, 26 N. E. 327.

**55.** *Prothero v. Citizens' St. Ry. Co.*, 134 Ind. 431, 33 N. E. 765. See *Maillefert v. Interborough R. T. Co.*, 50 Misc. Rep. (N. Y.) 160, 5 St. Ry. Rep. 763, 98 N. Y. Supp. 207.

**56.** *Barth v. Kansas City El. R. Co.*, 142 Mo. 535, 44 S. W. 778, 10 Am. & Eng. R. Cas. N. S. 281. A carrier is bound only to keep its station accommodations in a reasonably safe condition for passengers. *Robertson v. Wabash R. Co.*, 152 Mo. 382, 53 S. W. 1082; *Wolf v. Brooklyn F. Co.*, 54 App. Div. (N. Y.) 67, 66 N.

for an injury to a passenger resulting from stepping between the step and the platform in alighting from the car, in the absence of other evidence that such construction is unusual, faulty, or dangerous or has resulted in injury to others.<sup>57</sup> And where a car stopped at the curved portion of a subway platform, and a passenger in alighting fell into the space between the car and the platform and was injured, it was held that she was not in the exercise of due care, it appearing from the evidence that if she had looked she could have seen the space over which it was necessary to step and could have made the step in safety.<sup>58</sup> A street railway company which constructs a walk over a street temporarily submerged by a freshet, for the use of passengers in going from one car to another, is not, as matter of law, required to provide a light for such walk at night, but is required to make such walk reasonably safe, but not to make it "as reasonably safe as possible."<sup>59</sup> The use of an ordinary swinging door in the vestibule of a railway station does not render the company liable for injuries to a passenger by being struck by the door as it was violently pushed open by another heedless passenger in the absence of notice that the latter would demean himself in a dangerous manner, or that the maintenance of such a door under the circumstances was dangerous.<sup>60</sup> The company is subject to no duty to guard against such acts of rudeness of a fellow passenger and is not liable for his

Y. Supp. 298; *Cleveland, A. & C. R. Co. v. Anderson*, 21 Ohio C. C. 288, 11 O. C. D. 765.

**57.** *Gabriel v. Long Island R. Co.*, 54 App. Div. (N. Y.) 41, 66 N. Y. Supp. 301.

**58.** *Hilborn v. Boston & Northern St. R. Co.*, 191 Mass. 14, 4 St. Ry. Rep. 439, 77 N. E. 646.

Where there was a space of about three inches between a car and the platform it was held that such a space was a reasonable one, that there must necessarily be some space, and that its existence and the occurrence of an injury by a passenger getting

her foot caught in it in alighting was no evidence of negligence. *Willworth v. Boston Elev. Ry. Co.*, 188 Mass. 220, 4 St. Ry. Rep. 462, 74 N. E. 333. See *Ryan v. Manhattan Ry. Co.*, 121 N. Y. 126, 23 N. E. 1131.

**59.** *Finsetti v. Suburban R. Co.*, 32 Oreg. 1, 39 L. R. A. 517, 51 Pac. 84; *Gulf, C. & S. F. R. Co. v. Warlick*, 1 Ind. Ter. 10, 35 S. W. 235.

**60.** *Kurnan v. Manhattan R. Co.*, 28 Misc. Rep. (N. Y.) 516, 59 N. Y. Supp. 626; revg. 26 Misc. Rep. (N. Y.) 841, 58 N. Y. Supp. 394, and the company is not liable because the two sets of doors in the vestibule were

sudden negligent act.<sup>61</sup> Failure to put sand, ashes, or sawdust on a light snow and thin ice on a platform, at the bottom of stairs of an elevated railway station, is not negligence, there being no such obvious danger to passengers that the company was bound to anticipate that injury might be sustained by reason of it.<sup>62</sup> In case of a storm which causes a station platform to be slippery, it has been declared that it cannot be held, as matter of law, that it is not the duty of the company to adopt some measure to lessen the danger because the continuance of the storm might require its repetition.<sup>63</sup> It is the duty of a street railway company to provide passengers with reasonably safe places to alight, and it is liable for personal injuries to a passenger who was without fault, where the car was stopped to allow her to alight in a dangerous place, and the employees failed to warn her of the danger although they were aware of it.<sup>64</sup> But an elevated railroad company is not liable for an injury to a passenger caused by her shoes being caught in the rubber on a stairway leading to a station, where such stairway was out of order for only a few minutes before the accident, and the company had no notice of the condition.<sup>65</sup>

so close together that they overlapped when open, where such condition did not at all contribute to the injury.

**61.** Graeff v. Railroad Co., 161 Pa. St. 231, 28 Atl. 1107; Putnam v. Broadway & S. A. R. Co., 55 N. Y. 108, 14 Am. Rep. 190, 15 Abb. Pr. N. S. (N. Y.) 383; Thompson v. Manhattan Ry. Co., 75 Hun (N. Y.) 578, 27 N. Y. Supp. 608, where a passenger was injured by some one stepping on her foot, as she was passing through a crowd of persons on the platform.

**62.** Rusk v. Manhattan Ry. Co., 46 App. Div. (N. Y.) 100, 61 N. Y. Supp. 384; Kelly v. Manhattan Ry. Co., 112 N. Y. 443, 20 N. E. 383; Laidlaw v. Sage, 158 N. Y. 73, 52 N. E. 679; Taylor v. City of Yonkers, 105 N. Y. 202, 11 N. E. 642; Ring v.

City of Cohoes, 77 N. Y. 83; Ayers v. Village of Hammondsport, 130 N. Y. 665, 29 N. E. 265; O'Keefe v. Mayor, etc., of N. Y., 29 App. Div. (N. Y.) 524, 51 N. Y. Supp. 710. See also Gulf, C. & S. F. R. Co. v. Williams, 21 Tex. Civ. App. 469, 51 S. W. 653; Exton v. Central R. Co., 63 N. J. L. 356, 46 Atl. 1099; affg. 62 N. J. L. 7, 42 Atl. 486.

**63.** McGuire v. Interborough Rapid Transit Co., 104 App. Div. (N. Y.) 105, 4 St. Ry. Rep. 841, 93 N. Y. Supp. 316.

**64.** West Chicago St. R. Co. v. Kennedy-Cahill, 64 Ill. App. 539, 1 Chic. L. J. Wkly. 341; affd., 165 Ill. 496, 46 N. E. 368.

**65.** Foley v. Manhattan El. R. Co., 34 N. Y. Supp. 1050, 69 St. Rep. (N. Y.) 21.

§ 351. Stations and platforms — Overcrowding of. — Negligence is a question for the jury, where defendant permitted its station platform to become overcrowded with persons waiting for trains, so that one of them was pushed off the platform and injured, and evidence that defendant failed to erect a guard rail along the platform is admissible upon the question of defendant's negligence.<sup>66</sup> And where a person waiting for a car in an amusement park conducted by a street railway company was thrown between a motor car and a trailer as a result of the crowd pressing forward, it was held to be a question for the jury whether the company was negligent in failing to make provision against such dangers.<sup>67</sup> Where it appeared that a passenger had been in similar crowds before upon the station platform and had observed a similar failure on the part of the defendant to control the assemblage, and that she had formerly narrowly escaped injury, it was decided that it could not be said as a matter of law that the plaintiff herself was not in the exercise of due care or that she had assumed the risk of the injury that she suffered.<sup>68</sup> In the case of an elevated street railway or subway where the passengers pay their fare in advance and are then admitted to the station platform to wait for the train, injury to a passenger frequently results from the overcrowding of the platforms. In such a case the general rule seems to be that the company will be presumed to know the capacity of its platforms, and that as it has the means to control access thereto, it and its servants ought to anticipate the occurrence of such a result under conditions of this character, and ought in the exercise of necessary care to have reasonable precautions to guard against injuries from such a cause, and are negligent if they fail to take such precautions and to give to a passenger that degree of protection which he has a right to expect.<sup>69</sup> So where a passenger was forced from the platform as a result of its crowded condition, it

**66.** *McGearty v. Manhattan R. Co.*, 15 App. Div. (N. Y.) 2, 43 N. Y. Supp. 1086.

**67.** *Cousineau v. Muskegon Traction & L. Co.*, 145 Mich. 314, 4 St. Ry. Rep. 500, 108 N. W. 720. See *Murhl-*

*hause v. Monongahela St. Ry. Co.*, 201 Pa. St. 237, 50 Atl. 937.

**68.** *Kuhlen v. Boston & N. St. Ry. Co.*, 193 Mass. 341, 5 St. Ry. Rep. 385, 79 N. E. 815.

**69.** *Kuhlen v. Boston & U. St. Ry.*

was said in an action to recover for the injury so caused: "The defendant must be assumed to have known the capacity of its platform, and when it had admitted passengers to the extent of such capacity. If, when having done this, the passengers were not removed by its trains, it became its duty to permit no more to enter. It had no more right to accumulate a crowd at the rear, which, pressing forward, would precipitate those at the edge of the platform into the street, then it would have the right to go upon the platform and push them off." <sup>70</sup> Where it was contended that if the crowding of a platform was the ordinary crowding which occurs during rush hours, the company was not liable, the court said: "But in our opinion that would make it liable. We do not see how a jury could find that the defendant company was not negligent when it continued to assemble on its platforms, at certain hours in the day, such large crowds, necessarily going in opposite directions, that those on the outside, in spite of all they can do, are carried off the platform into the trench in which the tracks are laid." <sup>71</sup>

§ 352. **Nature of passenger's action for personal injuries.** — In the absence of a legal duty implied by law, from the relative rights of the parties, or arising out of contract, or created by statute, there can be no liability for a negligent injury.<sup>72</sup> In every

Co., 193 Mass. 341, 5 St. Ry. Rep. 385, 79 N. E. 815; *Veimeister v. Brooklyn Heights R. Co.*, 91 App. Div. (N. Y.) 510, 87 N. Y. Supp. 162; *Dittmar v. Brooklyn Heights R. Co.*, 91 App. Div. (N. Y.) 378, 2 St. Ry. Rep. 801, 86 N. Y. Supp. 876; *Dawson v. New York & Brooklyn Bridge*, 31 App. Div. (N. Y.) 537, 52 N. Y. Supp. 133; *Merwin v. Manhattan Ry. Co.*, 48 Hun (N. Y.) 608, 1 N. Y. Supp. 267; *affd.*, 113 N. Y. 653, 659, 21 N. E. 415.

**70.** *McGearty v. Manhattan Ry. Co.*, 15 App. Div. (N. Y.) 2, 43 N. Y. Supp. 1086.

**71.** *Beverly v. Boston Elevated Ry. Co.*, 194 Mass. 450, 5 St. Ry. Rep. 441, 80 N. E. 507.

**72.** *Massachusetts.* — *O'Callaghan v. Cronin*, 121 Mass. 114.

*Michigan.* — *Flint, etc., R. Co. v. Stark*, 38 Mich. 714.

*New Jersey.* — *Kahl v. Love*, 37 N. J. L. 5.

*New York.* — *Miller v. Woodhead*, 104 N. Y. 471, 11 N. E. 57; *Larmore v. Crown Point Iron Co.*, 101 N. Y. 391, 4 N. E. 752; *McAlpin v. Powell*, 70 N. Y. 126; *Mahan v. Brown*, 13 Wend. 261; *Sherman v. Western, etc., R. Co.*, 62 Barb. 150.

action against a street railroad corporation for negligence it must be shown that there is a legal duty existing by implication of law. A contract or statute creates this implication, but the duty exists independent of contract or statute, whenever the act or omission causing an injury is a breach of duty in itself, a want of ordinary care, a tort, whether a contract or statute exists or not.<sup>73</sup> A railway company, in assuming to provide means of transportation and travel, is under an implied duty to provide such means as shall be safe and shall not cause injury to the public.<sup>74</sup> In cases arising out of the injury of passengers, who are being carried for hire, by the negligence of the carrier, although the injury may have resulted from a breach of contract, the injured party may waive the contract and sue in tort upon the breach of its implied duty as a common carrier to use ordinary care and skill to avoid danger, or proceed against the carrier for breach of its contract for safe transportation. If the suit be *ex contractu* for a breach of the carrier's contract, the damages recovered will be limited to those caused proximately by the breach of contract, but if it be brought *ex delicto* for a breach of duty, whether arising out of contract or not, damages may be recovered for all injuries sustained which follow as the natural consequences of the negligent act.<sup>75</sup> In New York

*Ohio.* — Kerwhacker v. Cleveland, etc., R. Co., 3 Ohio St. 188.

*Pennsylvania.* — Warner v. Railroad Co., 6 Phila. 537.

**73.** Rich v. New York Cent. R. Co., 87 N. Y. 382, 11 Am. & Eng. R. Cas. 594; Clark v. St. Louis, etc., R. Co., 64 Mo. 440; Mayor, etc., of Albany v. Cunliff, 2 N. Y. 165; Peck v. Batavia, 32 Barb. (N. Y.) 634. In Rich v. New York Cent. R. Co., *supra*, FINCH, J., says: "We have been unable to find any accurate and perfect definition of a tort. Between actions plainly *ex contractu* and *ex delicto* there exists what has been termed a border land where the lines of distinction are shadowy and obscure, and the tort

and the contract become so nearly coincident as to make their practical separation somewhat difficult." "In such cases, the tort is dependent upon, while it is at the same time independent of, the contract; for if the latter imposes a legal duty upon a person, the neglect of that duty may constitute a tort founded upon contract."

**74.** Worster v. Forty-Second St., etc., R. Co., 50 N. Y. 203; Hunt v. Missouri, etc., R. Co., 14 Mo. App. 160; Philadelphia, etc., R. Co. v. Derby, 14 How. (U. S.) 468; Cumberland Val. R. Co. v. Hughes, 11 Pa. St. 141.

**75.** Baltimore City Pass. Ry. Co.

it has been held that an action for an alleged breach of an agreement by defendant to safely carry the plaintiff was based solely upon negligence; that the carrier's contract, though an important element in the right to recover, is not so as substance, but as inducement merely, showing the relationship, and the real ground of the action is the tort of the defendant. It is "an action to recover damages for a personal injury resulting from negligence," within the meaning of section 383 of the Code of Procedure limiting the time for the bringing of such actions.<sup>76</sup>

**§ 353. Companies or persons liable — Joint and several liability.**

— Where an injury has resulted from the concurrent negligence of two street railway companies contributing to the result, they are jointly and severally liable.<sup>77</sup> So where a passenger is injured in a collision between a street car and a railroad train, if the negli-

v. Kemp, 61 Md. 74; Nevin v. Pullman Car Co., 106 Ill. 222; Ames v. Union St. R. Co., 117 Mass. 541; Walsh v. Chicago, etc., R. Co., 42 Mo. 23; Warwick v. Hutchinson, 45 N. J. L. 61; Weston v. Grand Trunk R. Co., 54 Me. 376; Brown v. Chicago, etc., R. Co., 54 Wis. 342; Craker v. Chicago, etc., R. Co., 36 Wis. 657; Jacksonville St. Ry. Co. v. Chappell, 22 Fla. 616; Suburban Ry. Co. v. Brauss, 70 Ga. 368; D., L. & W. R. Co. v. Trautwein, 52 N. J. L. 169, 19 Atl. 178.

**76.** Webber v. Herkimer & Mohawk St. R. Co., 109 N. Y. 311, 16 N. E. 358; affg. 35 Hun (N. Y.) 44; Watson v. Forty-Second St. R. Co., 93 N. Y. 522; Carroll v. Staten Island R. Co., 58 N. Y. 126.

**77.** *Alabama.* — Georgia Pac. Ry. Co. v. Hughes, 87 Ala. 610.

*California.* — Tompkins v. Clay St. Ry. Co., 66 Cal. 163.

*Minnesota.* — Flaherty v. Minneapolis St. Ry. Co. 39 Minn. 328.

*Missouri.* — Snider v. Chicago & A. Ry. Co., 108 Mo. App. 234, 3 St. Ry. Rep. 563, 83 S. W. 530.

*New York.* — Barrett v. Third Ave. R. Co., 45 N. Y. 628; Schneider v. Second Ave. R. Co., 133 N. Y. 583; affg. 15 N. Y. Supp. 556.

*Pennsylvania.* — Rakenkamp v. United Traction Co., 14 Pa. Super. Ct. 635; Phila. & R. R. Co. v. Boyer, 97 Pa. St. 916.

Defendant operated an electric railway connecting with another line, and had a contract with the latter whereby through cars were run by both lines between their respective terminals. The agreement provided that each company should have full control of the cars while on its tracks, and that the ownership of the tracks should determine their responsibility to the public, etc.; that each company should receive a rental for the use of its cars by the other, and that the fares should belong to the company owning the tracks over which

gence of the railroad company operates as the proximate cause of the injury, the fact that the street car company was also guilty of negligence will not relieve the railroad company of its liability.<sup>78</sup> If a street railway was negligent, and its negligence contributed to the injury to plaintiff, occurring from a collision at the intersection of the street railway with a steam railway, it is immaterial, as affecting the liability of the street railway company, that the steam railroad also contributed to the injury.<sup>79</sup> Where a servant of a railroad company, acting within the scope of his authority, signals a motorman in charge of a street car to cross the railroad tracks, which the motorman proceeds to do, resulting in a collision between a train and the street car, a passenger injured in such collision may recover against the railroad company, if it appear that such signal was negligently given and it directly contributed to the collision.<sup>80</sup> Where plaintiff's decedent was riding on defendant's tracks on a car belonging to and operated by another railway which had contracted with defendant to run its cars over defendant's tracks, and while standing on the platform was struck by a tree growing near to the track, it was proper to direct a nonsuit, as he was not a passenger on defendant's road to whom any duty as such was owing by defendant.<sup>81</sup> And where a railway company is permitted by statute to lease all its property, and it is further provided by statute that technical words shall be understood according to their technical import, the word "lease"

they were collected. Plaintiff boarded one of defendant's cars while on the tracks of the other company, and paid her fare to the terminus of the latter's line. She was injured while alighting as the car was about to turn onto defendant's track, and after the switch had been thrown. She was entitled, for the fare paid, to ride at least a block farther, and over a portion of defendant's road. *Held*, that the companies were jointly liable for the injury, each receiving a consideration for her ride — the other company the fare, and defendant a rental

for its car, with the privilege of through service. *Richard v. Detroit, R. R. & L. O. Ry.*, 129 Mich. 458, 89 N. W. 52, 8 Detroit Leg. N. 1029.

**78.** *Chicago & A. R. Co. v. McDonnell*, 91 Ill. App. 488.

**79.** *Gulf, C. & S. F. Ry. Co. v. Holt*, (Tex. Civ. App.) 70 S. W. 591.

**80.** *Snider v. Chicago & A. Ry. Co.*, 108 Mo. App. 234, 3 St. Ry. Rep. 563, 83 S. W. 530.

**81.** *Sias v. Rochester Ry. Co.*, 169 N. Y. 118, 62 N. E. 132; affg. 64 N. Y. Supp. 1148.

having a settled technical meaning, and importing a contract by which one person divests himself and another person takes possession of property for a term, a railway company, leasing its property and franchises to another company, is not liable for an injury to a passenger of the lessee, resulting from negligence of the latter's employees.<sup>82</sup> But the holder of the legal title to a

**82.** *Moorshead v. United Rys. Co.*, 203 Mo. 121, 6 St. Ry. Rep. 42, 100 S. W. 611. In this case the court refers to the opinion rendered in the court below, 119 Mo. App. 541, 6 St. Ry. Rep. 45, 96 S. W. 261, in which a large number of cases are reviewed and the question considered at length. It was here said: "The proposition next to be considered is, conceding that the contract was a lease, did the United Railways Company nevertheless remain responsible for injuries to a passenger resulting from the negligence of the Transit Company? In other words, is a leasing railway company so far liable for the torts of the lessee that it must answer in damages for a tortious injury to the passenger? This question is one on which there is a great diversity of judicial opinion; but it is proper to state, as a circumstance bearing on the weight of authority, that, in most of the cases affirming the liability of the lessor, there were dissents. I think the preponderance of authority, and the great preponderance of reason, are against the liability of the lessor in such cases. I think, too, that, as a rule of law, the doctrine that the lessor is liable, is at war with the general rules and principles governing the liability of lessors for the acts of their lessees and the settled canons of statutory construction. As the statutes of this State give a street railway company power to lease all

of its property to another street railway company, there was direct statutory authority for the lease in dispute; and only those adjudications are exact precedents wherein statutory authority for the controverted lease existed. \* \* \*

Cases affirming the liability of a leasing railway company for torts of the lessee should be classified with reference to the existence of such a statute when the lease was executed. All courts agree that in the absence of a statute, a lease of its property and franchises by a railway company, does not relieve it of its public duties and responsibilities, and that the lessor remains liable for the torts of the lessee. In other words, there is no common-law authority for such leasing by railroad companies; that at least in so far as the contract impairs the right of the public to hold the lessor answerable for the proper discharge of the duties it assumed in consideration of the powers granted to it by the sovereignty. *Railway Co. v. Brown*, 17 Wall (U. S.) 445, 21 L. ed. 675; *Thomas v. Railroad*, 101 U. S. 71, 25 L. ed. 950; *Chollette v. Same*, 26 Neb. 159, 41 N. W. 1106, 4 L. R. A. 135; *Muntz v. Same*, 111 La. 423, 35 So. 624, 64 L. R. A. 222, 100 Am. St. Rep. 495. Before going into a discussion of the question on principle, it is well to classify the adjudications, so that those directly in point may be studied more readily,

street railway, who has executed an agreement acknowledging that he bought it as the agent of, and in trust for, and with the money of a committee, and covenanting to hold it as the agent of, and in

and those wherein the proposition affirmed is not identical with the one involved here may have attached to them the value they merit as containing the lucubrations of judges on the general question and not treated as precedents on the exact question before us. When the lease is authorized by statute, the leasing company, of course, remains liable for the acts of the lessee if the statute says it shall. *Smith v. Railroad*, 61 Mo. 17; *Markey v. Railroad* 185 Mo. 348, 84 S. W. 61; *Main v. Same*, 18 Mo. App. 388; *Brown v. Same*, 27 Mo. App. 396; *McCoy v. Same*, 36 Mo. App. 445; *Qusted v. Railroad*, 127 Mass. 204; *Daniels v. Hart, Treas.*, 118 Mass. 543; *Bower v. Railroad*, 42 Iowa 546; *Whitney v. Railroad*, 44 Me. 362, 69 Am. Dec. 103; *Stearns v. Railroad*, 46 Me. 95. When the statute authorizes the leasing, but says nothing as to whether the lessor shall remain liable, a few courts hold that nevertheless the lessor is liable as fully as the lessee itself would be for the latter's tortious acts; and, in pursuance of this extreme view, these courts have held the leasing company liable for negligent injuries inflicted by the lessee on its own servants. *Chicago, etc., R. R. v. Hart*, 209 Ill. 414, 70 N. E. 654, 66 L. R. A. 75; *Logan v. Railroad Co.*, 116 N. C. 940, 21 S. E. 959; *Harden v. Same*, 129 N. C. 354, 40 S. E. 184, 55 L. R. A. 784, 85 Am. St. Rep. 747; *Singleton v. Same*, 70 Ga. 464, 48 Am. Rep. 574; *Bank v. Same*, 25 S. C. 216; *Hart v. Same*, 33 S. C. 427, 12 S. E. 9, 10 L. R. A. 794. In the case

last cited the court went so far as to hold the lessor liable in punitive damages for the wrongful conduct of the lessee. The doctrine of other tribunals is that the leasing company remains liable to third persons for an injury received because of the improper construction or bad repair of the roadbed, station houses, or other real property, on the ground that it was the peremptory duty of the lessor to maintain its properties in good condition for the use of the general public, including as part of the public the servants of the leasing company. *Lee v. Railroad*, 116 Cal. 97, 47 Pac. 932, 38 L. R. A. 71, 58 Am. St. Rep. 140. In certain cases which maintained the doctrine that the lessor is not exonerated by a statutory lease from responsibility for the wrong performance by the lessee of any charter power or duty, it is held that the safe operation of cars and trains on which passengers are carried is a charter duty. *Railway Co. v. Culberson*, 72 Tex. 375, 10 S. W. 706, 3 L. R. A. 567, 13 Am. St. Rep. 805. We have found no Missouri statute, relating either to the chartering of companies or to their regulation, which undertakes to impose on street car companies, by special legislative enactment, the duty of careful operation of cars for the security of passengers, though such companies are under a common-law duty of that sort. There are cases wherein the general principle that the leasing company remains responsible for the proper performance of its charter duties is adhered to, but the

trust for, said committee, and to manage it exactly according to the orders and instructions of the committee, without further com-

operation of trains and cars is declared not to be one of those duties. *Mahoney v. Railroad*, 63 Me. 68; and note to *Ohio, etc., R. R. v. Dunbar*, (Ill.) 71 Am. Dec. 291, wherein, on page 297, it is said that a case holding the contrary does not accord with sound principle or authority. Other decisions repudiate these various distinctions as of no importance, and ground the non-liability of the lessor on the grant of statutory power to make a lease, holding that this imports a lease with all the usual incidents and consequences of that sort of a contract, one of which is that if the property is in safe and good condition when turned over to the lessee, the lessor is not responsible for subsequent injuries arising from its bad repair. *Fisher v. Railroad*, 34 Hun (N. Y.) 433; *Miller v. Railroad*, 125 N. Y. 118, 26 N. E. 35.

The foregoing cases may be classified, too, with reference to the principles on which they hold the leasing company responsible. Some courts profess to do this because public policy requires it, but disagree as to what particular public policy is to be subserved by the rule. Some ground the responsibility, as we have seen, on the fact that a railway company is an artificial person, deriving its powers from the sovereignty and in consideration of those powers, agreeing to perform certain duties for the sovereignty; hence should be held strictly accountable for their proper performance. Other cases declare that charter duties cannot be transferred and that it is a charter duty to carry passengers safely.

Others that neither charter nor common duties can be transferred to a lessee so as to shift responsibility from the lessor; and that if the safe carriage of passengers is not a charter duty of the leasing company, it is at least a common-law duty, for the due performance of which the company that owns the railway is answerable. Much stress is laid in some decisions on the supposed fact that if one railway company is permitted to lease its property to another, and thereby relieve itself from liability for the lessee's torts, leases may be made to irresponsible companies and the public left remediless. *Harden v. Railroad*, 129 N. C. 354, 40 S. E. 184, 55 L. R. A. 784, 85 Am. St. Rep. 747. There is one case—perhaps there may be others—which held the lessor responsible, apparently on the ground that the lease did not transfer every franchise possessed by the lessor. *Braslin v. Somerville*, 145 Mass. 64, 13 N. E. 65. Still other cases hold the lessor responsible because, by the terms of the lease, it retains control of the management and operation of the leased property. *Driscoll v. Railroad*, 65 Conn. 230, 32 Atl. 354.

The court then refers to numerous other cases and further says:

"Now, the word 'lease' has a settled technical import. It imports a contract by which one person, either natural or artificial, divests himself or itself of, and another person takes possession of, lands or chattels for a term. Certain immunities and responsibilities attach to every lease by the well-settled rules of law unless

pensation than his salary as bookkeeper, and to convey it on request of the committee, is not a mere agent, but a trustee for the com-

there are covenants to the contrary. One of these incidents is that if the demised property is turned over to the lessee in good condition, the lessor is not afterwards liable for damages resulting from the negligent use of the property by the lessee. *Ward v. Fagin*, 101 Mo. 669, 14 S. W. 738, 10 L. R. A. 147, 20 Am. St. Rep. 650; *Gordon v. Peltzer*, 56 Mo. App. 599; *Mancuso v. Kansas City*, 74 Mo. App. 138. According to the mandate of the statutes for the construction of laws, the word 'lease' in the street railway statutes must receive its ordinary legal meaning, for there is nothing in the context repugnant to that meaning; but, on the other hand, all the contextual language points to a conclusion that the legislature used the word in its usual sense. Hence we hold that, in authorizing a street railway company to lease its property and authorizing the lessee to operate the property thus leased, the legislature intended that the lessee should be answerable for the manner in which it used the property and the lessor should not be. Furthermore, it happens that there have been other statutes enacted in this State authorizing a railway company to lease its property, in which the legislature expressly provided for the retention of liability on the part of the lessor for the proper performance of the duties it owed to the public. *McCoy v. Railroad Co.*, 36 Mo. App. 445. The same court which decided the *McCoy* case, stated in *Brown v. Railroad*, 27 Mo. App. 394, 400, that railway companies cannot, 'by a lease, without the consent of the State, escape re-

sponsibility for the acts of the lessee \* \* \* but with such consent it may undoubtedly do so;" citing various cases, including *Mahoney v. Railroad*, 63 Me. 68. The opinion then calls attention to the fact that by section 790 of the Revised Statutes of 1879 (section 1060, Rev. St. 1899) it is provided that any railroad company in this State leasing its road to a corporation of another State, should remain liable just as if it operated the road itself. See, too, *Main v. Railroad*, 18 Mo. App. 388. In *Markey v. Railroad*, 185 Mo. 348, 84 S. W. 61, the liability of the leasing company was expressly reserved by the statutes and hence the case is not in point as an authority on the question before us. But from it and other cases, and from the statutes themselves, we learn that the legislature of this State has not omitted from enactments authorizing railway leases, clauses reserving liability against a leasing railway company for the torts of the lessee, when the purpose was to continue the responsibility of the former. Hence it is fair to presume that when no reservation of liability was made in the act, either by express words or by implication, the intention was that the lessee alone should be answerable for its torts. That this interpretation of the statute is a sound one, is maintained by practically all the elementary treatises and, in our judgment, by the weight of judicial opinion. The following cases are directly in point. *Arrowsmith v. Nashville, etc., Co.*, (C. C.) 57 Fed. 165; *Heron v. Railroad*, 68 Minn. 542, 71 N. W. 706; *Hayes v.*

mittee, so that he is responsible for the negligence of a motorman.<sup>83</sup>

<p>Railroad, 74 Fed. 279, 20 C. C. A. 52; Caruthers v. Railroad, 59 Kan. 629, 54 Pac. 673, 44 L. R. A. 737; Mahoney v. Railroad, 63 Me. 69; St. L. R. R. v. Curl, 28 Kan. 622; Seziwak v. Railroad, 4 Pa. Dist. R. 339; Lakin v. Railroad, 13 Oreg. 436, 11 Pac. 68, 57 Am. Rep. 25; Gwathney v. Railroad, 12 Ohio St. 92; Texas,</p>	<p>etc., v. Mangum, 68 Tex. 342, 4 S. W. 617; Fisher v. Railroad, 34 Hun (N. Y.) 433; Ditchett v. Railroad, 67 N. Y. 425; Mayer v. Railroad, 113 N. Y. 311, 21 N. E. 60; Miller v. Railroad, 125 N. Y. 118, 26 N. E. 35." <i>Per</i> GOODE, J.  <b>83.</b> O'Toole v. Foulkner, 29 Wash. 544, 70 Pac. 58.</p>
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## CHAPTER XVI.

## Passengers; Contributory Negligence.

## SECTION 354. Care required of passenger in general — General rules.

355. Care required of passenger continued.

356. Care required of passenger — Part of body projecting beyond side of car.

357. Contributory negligence of children.

358. Contributory negligence of infirm persons.

359. Traveling in violation of statute not contributory negligence.

360. Entering conveyance.

361. Entering conveyance continued.

362. Entering conveyance by front platform.

363. Leaving conveyance — Generally.

364. Leaving conveyance — Taking position preparatory to.

365. Leaving conveyance — As to place.

366. Leaving conveyance — crossing parallel tracks.

367. Sudden peril — Acts in emergencies.

368. Sudden peril — Acts in emergencies — Application of rules.

## § 354. Care required of passenger in general — General rules. —

A passenger is bound only to exercise ordinary care and prudence to preserve himself from injury.<sup>1</sup> He is not bound to do any possible thing which, in the exercise of ordinary care, does not

1. *California*. — See *Lee v. Market St. Ry. Co.*, 135 Cal. 293, 67 Pac. 765, 24 Am. & Eng. R. Cas. N. S. 578.

*District of Columbia*. — *Capital Traction Co. v. Brown*, 35 Wash. Law Rep. 306, 5 St. Ry. Rep. 97.

*Georgia*. — *Georgia Ry. & Elec. Co. v. McAllister*, 126 Ga. 447, 5 St. Ry. Rep. 128, 54 S. E. 957.

*Illinois*. — *West Chicago St. R. Co. v. Manning*, 170 Ill. 417, 48 N. E. 958; *West Chicago St. R. Co. v. Horne*, 197 Ill. 250, 64 N. E. 331; affg. 100 Ill. App. 259; *West Chicago St. R. Co. v. McNulty*, 166 Ill. 203,

46 N. E. 784; affg. 64 Ill. App. 549, 1 Chic. L. J. Wkly. 373.

*Indiana*. — *Frank Bird Transfer Co. v. Krug*, 30 Ind. App. 602, 65 N. E. 309.

*Kentucky*. — *Kentucky & I. Bridge Co. v. Buckler*, 30 Ky. Law Rep. 1086, 5 St. Ry. Rep. 324, 100 S. W. 328; *Louisville City Ry. Co. v. Hudgins*, 30 Ky. Law Rep. 316, 5 St. Ry. Rep. 335, 98 S. W. 275.

*Louisiana*. — *Clerc v. Morgan's L. & T. R. Co.*, 107 La. 370, 31 So. 886.

*Massachusetts*. — *Rose v. Boston & N. St. Ry. Co.*, 194 Mass. 415, 5 St. Ry. Rep. 434, 80 N. E. 580.

occur to him or seem feasible.<sup>2</sup> The law requires a person to use his own faculties so as to avoid danger if he can reasonably do so, and a failure in that regard, if it contributes proximately to his injury, will prevent a recovery.<sup>3</sup> If a passenger knowingly exposes himself to danger, such as an ordinarily prudent person under the circumstances would not have done, and is thereby injured, or if by reasonable precautions he could have foreseen the danger and avoided the injury, he ought not to be allowed damages.<sup>4</sup> It is the duty of passengers to act with prudence, and to use the means provided for their transportation with reasonable discretion and care. Passengers familiar with the operation of cars at a particular place are bound to avail themselves of such knowledge.<sup>5</sup> And where one, by reason of his own voluntary intoxication, exposes himself to danger and receives injuries which he could, and by the exercise of ordinary care and prudence would, have avoided if sober, he is guilty of contributory negligence and cannot recover for such injuries.<sup>6</sup> It is the duty of a passenger on a street car to conduct himself in a decent and orderly manner, and to observe and obey the reasonable rules established by the carrier for the benefit of its service and for the safety, convenience, and comfort of the other passengers. If he fails or refuses to do

*Minnesota.* — *Smith v. St. Paul City Ry. Co.*, 32 Minn. 1, 18 N. W. 827, 50 Am. Rep. 550.

*Missouri.* — See *Cobb v. Lindell R. Co.*, 149 Mo. 135, 50 S. W. 310.

*New Hampshire.* — See *Parkinson v. Concord St. Ry. Co.*, 71 N. H. 28, 51 Atl. 268, 24 Am. & Eng. R. Cas. N. S. 575.

*South Carolina.* — *Carroll v. Charleston & S. R. Co.*, 65 S. C. 378, 43 S. E. 870.

See *Doolittle v. Southern*, 62 S. C. 130, 40 S. E. 133.

*Texas.* — *Missouri K. T. R. Co. v. Miller*, 8 Tex. Civ. App. 241, 27 S. W. 905.

As to contributory negligence of

passenger, see note 4 St. Ry. Rep. 49.

2. *West Chicago St. R. Co. v. Horne*, 197 Ill. 250, 64 N. E. 331; affg. 100 Ill. App. 259.

3. *Indianapolis Traction & Term. Co. v. Pressell*, 39 Ind. App. 472, 4 St. Ry. Rep. 286, 77 N. E. 357.

4. *Union Traction Co. v. Sullivan*, 38 Ind. App. 513, 4 St. Ry. Rep. 240, 76 N. E. 116.

5. *Elliott v. Wilmington City Ry. Co.*, 6 Penn. (Del.) 570, 6 St. Ry. Rep. 482, 73 Atl. 1040.

6. *Bageard v. Consolidated Traction Co.*, 64 N. J. L. 316, 45 Atl. 620.

As to intoxicated passengers, see note 6 St. Ry. Rep. 628 *et seq.*

this he forfeits his right under the contract of carriage and subjects himself to removal from the car.<sup>7</sup> The rule for determining whether a passenger has failed to exercise the proper degree of care is whether a person of ordinary prudence, in the same situation and having the knowledge possessed by the passenger, would have done the alleged negligent act.<sup>8</sup> The exercise of ordinary care does not require that passengers on street cars should be all the time on the lookout for deep and unguarded holes in or close to the entrance of such cars, nor to watch for unheralded removal of safeguards formerly existing.<sup>9</sup> A slight inattention to duty on the part of the passenger, not the proximate cause of the injury, which resulted to him from the gross carelessness of the carrier, will not defeat a recovery.<sup>10</sup> But a passenger cannot place himself in a position of obvious danger and thereafter hold the carrier liable for the result of his own carelessness.<sup>11</sup> What is ordinary care in a passenger in respect to the position he assumes on a street car is a question for the determination of the jury.<sup>12</sup>

**7.** *McQuerry v. Metropolitan St. Ry. Co.*, 117 Mo. App. 255, 5 St. Ry. Rep. 592, 92 S. W. 912.

**8.** *Clerc v. Morgan's L. & T. R. Co.*, 107 La. 370, 31 So. 886.

**9.** *Lake St. Elev. R. Co. v. Burgess*, 99 Ill. App. 499.

See sections 300, 308, 365, herein, as to place of alighting from car.

**10.** *Atchison, T. & S. F. R. Co. v. Hughes*, 55 Kan. 491, 2 Am. & Eng. R. Cas. N. S. 248, 40 Pac. 819; *Kansas & A. V. R. Co. v. White*, 14 C. C. A. 483, 67 Fed. 481.

**11.** *United States*. — *Chicago, etc., R. Co. v. Myers*, 80 Fed. 361, 25 C. C. A. 486, 49 U. S. App. 279.

*District of Columbia*. — *Edgerton v. Balt. & Ohio R. Co.*, 23 Wash. L. Rep. 369.

*Maryland*. — *State, Sharkey v. Lake Roland El. R. Co.*, 84 Md. 163, 34 Atl. 1130, 28 Chic. Leg. N. 410.

*New York*. — *Sias v. Rochester R.*

*Co.*, 18 App. Div. 506, 46 N. Y. Supp. 582, 92 Hun 140, 51 App. Div. 618; *affd.*, 169 N. Y. 118, 62 N. E. 132; *Kimber v. Metropolitan St. Ry. Co.*, 69 App. Div. 353, 74 N. Y. Supp. 966.

*Pennsylvania*. — *Aikin v. Frankford, etc., R. Co.*, 142 Pa. St. 47, 21 Atl. 781.

**12.** *Smith v. St. Louis Transit Co.*, 120 Mo. App. 328, 6 St. Ry. Rep. 786, 97 S. W. 218, citing the following cases:

*United States*. — *Farlow v. Kelly*, 108 U. S. 228, 2 S. Ct. 555, 27 L. ed. 726.

*Louisiana*. — *Summers v. Railroad*, 34 La. Ann. 139, 44 Am. Rep. 419.

*Maryland*. — *Jones v. United Railways Co.*, 99 Md. 64, 2 St. Ry. Rep. 406, 57 Atl. 620.

*Minnesota*. — *Dahlberg v. Minneapolis St. Ry. Co.*, 32 Minn. 404, 21 N. W. 545, 50 Am. Rep. 585.

§ 355. Care required of passenger continued. — A passenger on a street car is not chargeable with contributory negligence, as a matter of law, because he stood on the platform of the car with knowledge of its overcrowded condition, where there was no evidence that he was ever in a street car before, or that he knew of any fact, other than the crowded condition of the platform, which would expose him to danger.<sup>13</sup> If a passenger attempts to leave a moving car running at a high rate of speed, the attempt will be so obviously dangerous that he cannot recover for an injury occasioned thereby. It cannot be said, however, as a matter of law, that it is negligent to alight from a moving car or to board it while in motion. The circumstances attending the act and the speed of the car make it a question of fact for the jury.<sup>14</sup> Neither is the

*Missouri.* — *Miller v. Railway*, 5 Mo. App. 471.

*New York.* — *Tucker v. Railway*, 65 N. Y. Supp. 989.

*Pennsylvania.* — *Germantown Passenger Ry. Co. v. Brophy*, 105 Pa. St. 38; *Federal Street & Pleasant V. R. Co. v. Gibson*, 96 Pa. 83.

See also *Engelhardt v. New York City Ry. Co.*, 52 Misc. Rep. (N. Y.) 274, 102 N. Y. Supp. 516.

13. *Cattano v. Met. St. Ry. Co.*, 173 N. Y. 565, 66 N. E. 563; affg. 73 N. Y. Supp. 1131.

See sections 315 and 316 herein, as to riding on platforms of cars.

14. *Alabama.* — *Birmingham R. & Elec. Co. v. James*, 121 Ala. 120, 25 So. 147; *McDonald v. Mont. St. R. Co.*, 110 Ala. 161, 20 So. 317.

*Colorado.* — *Posten v. Denver Consol. Tramway Co.*, 11 Colo. App. 187, 53 Pac. 391; *Pueblo El. St. R. Co. v. Sherman*, 25 Colo. 114, 53 Pac. 322.

*District of Columbia.* — *Rouser v. Washington & G. R. Co.*, 26 Wash. Law Rep. 559, 13 App. (D. C.) 320; *Jones v. Balt. & O. R. Co.*, 4 App. (D. C.) 158.

*Georgia.* — *Sanders v. Southern R. Co.*, 107 Ga. 132, 32 S. E. 540, 14 Am. & Eng. R. Cas. N. S. 281; *Coursey v. Southern R. Co.*, 113 Ga. 297, 38 S. E. 866.

*Illinois.* — *Chicago Union Traction Co. v. Lundoahl*, 215 Ill. 289, 4 St. Ry. Rep. 183, 74 N. E. 155; *Chicago Union Traction Co. v. Hanthorn*, 211 Ill. 367, 3 St. Ry. Rep. 141, 71 N. E. 1022; *Chicago & A. R. Co. v. Brynn*, 153 Ill. 131, — N. E. —; *Chicago City R. Co. v. Meehan*, 77 Ill. App. 215.

*Maryland.* — *United Rys. & Elec. Co. v. Weir*, 102 Md. 286, 4 St. Ry. Rep. 398, 62 Atl. 588.

*Massachusetts.* — *Nichols v. Lynn & B. R. Co.*, 168 Mass. 528, 47 N. E. 427; *Merritt v. New York, N. H. & H. R. Co.*, 162 Mass. 326, 38 N. E. 447.

*Michigan.* — *Brittan v. Grand Rapids St. R. Co.*, 90 Mich. 159, 51 N. W. 276.

*Missouri.* — *McDonald v. Kansas City & Independence Rapid Transit Ry. Co.*, 127 Mo. 38, 29 S. W. 848; *McKee v. St. Louis Transit Co.*, 108

passenger bound to know that the place where he does alight is safe.<sup>15</sup> Nor does his failure to advise the carrier's employee of a threatened danger subject him to the charge of contributory negligence where he does not undertake management or direction.<sup>16</sup> One is not guilty of contributory negligence in riding on the footboard of an open car where all the seats are occupied.<sup>17</sup>

Mo. App. 470, 3 St. Ry. Rep. 555, 83 S. W. 1013; *Eikenbury v. St. Louis Transit Co.*, 103 Mo. App. 442, 3 St. Ry. Rep. 557, 80 S. W. 360; *Dimmitt v. Hannibal & St. J. R. Co.*, 40 Mo. App. 654.

*Nebraska*. — *Chicago, B. & Q. R. Co. v. Hyatt*, 48 Neb. 161, 67 N. W. 8, 4 Am. & Eng. R. Cas. N. S. 44.

*New York*. — *Wallace v. Third Ave. R. Co.*, 36 App. Div. 57, 55 N. Y. Supp. 132, 5 Am. Neg. Rep. 215.

*North Carolina*. — *Hodges v. Southern R. Co.*, 120 N. C. 555, 27 S. E. 128.

*Pennsylvania*. — *Sweeney v. Union Traction Co.*, 199 Pa. St. 293, 49 Atl. 66; *Foster v. Union Tract. Co.*, 199 Pa. St. 498, 49 Atl. 270; *Shade v. Union Tract. Co.*, 7 Pa. Dist. R. 34, 20 Pa. Co. Ct. R. 292.

*Tennessee*. — *Southern R. Co. v. Mitchell*, 98 Tenn. 27, 40 S. W. 72.

*Utah*. — *Paul v. Salt Lake City R. Co.*, 30 Utah 41, 4 St. Ry. Rep. 1049, 83 Pac. 563

*Wisconsin*. — *Kohler v. West Side R. Co.*, 99 Wis. 33, 74 N. W. 568.

See sections 360-366, *post*, herein, as to contributory negligence in boarding or alighting from car.

"A railway company, in letting its passengers on and off its cars, is bound to stop its cars and to wait a reasonable time for the passengers to get on or off, at its usual stopping places, and also to use and exercise all reasonable care to secure the safe-

ty of passengers. While the common carrier is held to strict care in the safe transportation of passengers, yet it must be borne in mind that it by no means is an insurer of their safety, but is only responsible for its own negligence in causing an injury. On the other hand, there is a duty resting upon the passenger to act with prudence, and to use the means provided for transportation with reasonable discretion and care; and, if her negligent act contributes in bringing about the injury of which she complains, she cannot recover. It is also the duty of a passenger to see that the car has stopped, and that she may get off safely, and also to exercise all reasonable care in getting on or off. Reasonable care would be such care as a person of ordinary prudence would take under similar circumstances to avoid accident. The care should be proportioned in all cases to the risk incurred." *Reiss v. Wilmington City Ry. Co.*, (Del.) 6 St. Ry. Rep. 795, 67 Atl. 153.

15. *Henry v. Grant St. Electric Ry. Co.*, 24 Wash. 246, 64 Pac. 137.

See sections 300, 308, 365, herein, as to place of alighting.

16. *Perez v. New Orleans City & L. R. Co.*, 47 La. 1391, 17 So. 869.

17. *Anderson v. City Suburban R. Co.*, 42 Oreg. 505, 71 Pac. 659; *Le-pointe v. Middlesex R. Co.*, 144 Mass. 18, 10 N. E. 497; *Graham v. Manhat-*

And in occupying a seat which faces the fender at the rear of an open car, a person is not guilty of contributory negligence, as he has the right to assume that in inviting and permitting its use it is suitable for him to occupy.<sup>18</sup> There can be no recovery for injuries sustained by a passenger on a street car platform where standing thereon is an act of carelessness, or failure to exercise such care as men of ordinary prudence would exercise under the same circumstances.<sup>19</sup> But ordinarily standing on the front or rear platform even of an electric or cable car with the permission of the employees controlling the car is not so obviously dangerous as to prevent recovery by a passenger who, without other fault, is injured.<sup>20</sup> A passenger, acting in a prudent and careful manner, is not bound to look and listen to avoid danger from other passing or approaching cars.<sup>21</sup> But to attempt to alight after a car had stopped at both crossings of a street, and started up again, may constitute negligence.<sup>22</sup> It is not necessarily a negligent act for

tan R. Co., 149 N. Y. 336, 43 N. E. 917; *Seymour v. The Citizens' Ry. Co.*, 114 Mo. 266, 21 S. W. 739; *Craighead v. B. C. R. Co.*, 123 N. Y. 391, 25 N. E. 387; *Gilly v. New Orleans City R. Co.*, 49 La. Ann. 588, 21 So. 850; *Sheern v. Coney Island & B. R. Co.*, 78 App. Div. (N. Y.) 476, 79 N. Y. Supp. 752.

See section 319, herein, as to riding on running-board.

**18.** *Spooner v. Old Colony St. Ry. Co.*, 189 Mass. 275, 4 St. Ry. Rep. 472, 75 N. E. 635.

**19.** *Beal v. Lowell & B. St. R. Co.*, 157 Mass. 444, 32 N. E. 653.

**20.** *Seymour v. Citizens' St. R. Co.*, 114 Mo. 266, 58 Am. & Eng. R. Cas. 395, 21 S. W. 739; *Matz v. St. Paul City R. Co.*, 52 Minn. 159, 53 N. W. 1071; *Cogswell v. West St., etc., R. Co.*, 5 Wash. 46, 52 Am. & Eng. R. Cas. 500, 31 Pac. 411, 7 Am. R. & Corp. Rep. 48; *Herd v. Rochester City & B. R. Co.*, 20 N. Y. Supp.

346, 48 St. Rep. (N. Y.) 46; *Met. R. Co. v. Snashall*, (D. C. App.) 22 Wash. L. Rep. 377; *Noble v. St. J. & B. H. St. R. Co.*, 98 Mich. 249, 57 N. W. 126; *Grotsch v. Steinway R. Co.*, 19 App. Div. (N. Y.) 130, 45 N. Y. Supp. 1075; *Jackson v. Phila. Tract. Co.*, 182 Pa. St. 104, 37 Atl. 827; *Bailey v. Tacoma Tract. Co.*, 16 Wash. 48, 47 Pac. 341; *Fisher v. W. Va. & P. R. Co.*, 42 W. Va. 183, 33 L. R. A. 69, 4 Am. & Eng. R. Cas. N. S. 86, 24 S. E. 570; *North Chicago St. R. Co. v. Williams*, 140 Ill. 275, 52 Am. & Eng. R. Cas. 522, 29 N. E. 672; *affg.* 40 Ill. App. 590; *Lehr v. Steinway & H. P. R. Co.*, 118 N. Y. 556, 30 St. Rep. (N. Y.) 1.

**21.** *Hollingsworth v. Cincinnati St. Ry. Co.*, 21 Ohio C. C. 536, 12 Ohio C. D. 100.

**22.** *Ackerstadt v. Chicago City Ry. Co.*, 194 Ill. 616, 62 N. E. 884; *affg.* 94 Ill. App. 130.

a passenger to attempt to board a car next to a parallel track, even where there is a chain across the entrance to the platform as he chain is merely notice that he is liable to be struck by passing cars.<sup>23</sup> It is not contributory negligence, as a matter of law, to stand in the aisle of a car where other passengers are permitted to stand when the seats are filled, or while seeking to gain the attention of the conductor in order to signal him of a desire to alight from the car.<sup>24</sup> But of the usual and necessary movements of the car, though sudden, a passenger takes the risk.<sup>25</sup> So, a passenger may be guilty of negligence in failing to hold on to the railings of the car while alighting, although the car is in slow motion.<sup>26</sup> A passenger is not *per se* guilty of contributory negligence in standing in the door of a car in order to alight quickly, or where directed to do so by an employee of the car, who did not warn her of the danger, and where it was not apparently known to her.<sup>27</sup> A passenger may be negligent in failing to obey a regulation of the carrier of which he has knowledge, or should have knowledge;<sup>28</sup> yet, if the company's employees allow, without objection, the infraction of the regulation, as where passengers were accustomed, in violation of a rule of the company, to swing around from the steps of an electric car to that of the trailer, and injury results from an electric shock caused by imperfect insulation, the person injured will not be held negligent, as matter of law.<sup>29</sup>

**23.** *Schwartz v. Cincinnati St. R. Co.*, 8 Ohio C. C. 484, 1 Ohio Dic. 197. And see *De Rozas v. Met. St. R. Co.*, 13 App. Div. (N. Y.) 296, 43 N. Y. Supp. 27; *Sexton v. Met. St. R. Co.*, 40 App. Div. (N. Y.) 26, 6 Am. Neg. Rep. 135, 57 N. Y. Supp. 577; *Dale v. Brooklyn City, etc., R. Co.*, 1 Hun (N. Y.) 146, 3 T. C. 686; *affd.*, 60 N. Y. 638.

**24.** *Griffith v. Utica M. R. Co.*, 17 N. Y. Supp. 692, 43 St. Rep. (N. Y.) 835; *Ripley v. Second Ave. R. Co.*, 8 Misc. Rep. (N. Y.) 449, 59 St. Rep. (N. Y.) 37, 28 N. Y. Supp. 683.

**25.** *Brennan v. Brooklyn H. R. Co.*, 5 Am. Electl. Cas. 416, 12 Misc. Rep. (N. Y.) 570, 67 St. Rep. (N. Y.) 605, 33 N. Y. Supp. 852.

**26.** *Root v. Des Moines City Ry. Co.*, 113 Iowa 675, 83 N. W. 904.

**27.** *Consol. Tract. Co. v. Thalheimer*, 59 N. J. L. (30 Vroom) 474, 37 Atl. 132; *Prothero v. Citizens' R. Co.*, 134 Ind. 431, 33 N. E. 765.

**28.** *Lake Shore & M. S. R. Co. v. Kelsey*, 180 Ill. 130, 54 N. E. 608.

**29.** *Burt v. Douglass Co. St. R. Co.*, 83 Wis. 229, 53 N. W. 447, 18 L. R. A. 479.

§ 356. Care required of passenger — Part of body projecting beyond side of car. — A passenger sitting beside an open window, riding with his arm resting on the sill not more than three inches outside the car, is not necessarily negligent so as to preclude recovery for an injury to his arm caused by another car passing on a switch.<sup>30</sup> And where a passenger projected his head beyond the side of the car to expectorate, whereby he came in contact with a pole which the company had placed very near the track, it was held that he was not, as a matter of law, so lacking in care and caution that he was precluded from recovering damages for the injuries sustained.<sup>31</sup> But under certain conditions of speed and surroundings it may be negligent, as a matter of law, for a passenger to permit his arm, or any portion of his body, to protrude beyond the outside line of the car, and the same rule be applicable as in the case of passengers on steam roads.<sup>32</sup> So, if a passenger unnecessarily and voluntarily leave his seat and thus expose himself to danger and come in contact with some object in close proximity to the track, he cannot recover for the injury thus occasioned.<sup>33</sup> And where a passenger riding on the rear platform pro-

**30.** *Tucker v. Buffalo R. Co.*, 53 App. Div. (N. Y.) 571, 65 N. Y. Supp. 989; *Sweeny v. Union Ry. Co.*, 31 Misc. Rep. (N. Y.) 472, 797, 64 N. Y. Supp. 453. And see *Francis v. New York Steam Co.*, 114 N. Y. 380, 21 N. E. 988; affg. 13 Daly (N. Y.) 510, 1 St. Rep. (N. Y.) 261; *Schneider v. New Orleans & C. R. Co.*, (C. C., E. D. La.) 54 Fed. 466; *Gulf C. & S. F. R. Co. v. Killebrew*, (Tex.) 20 S. W. 182; reversed on other grounds, id. 1005.

It is not negligence *per se* for a passenger on a street car to expose his elbow to a slight extent from the window of a car or to rest it on the window sill within the car. *Smith v. St. Louis Transit Co.*, 120 Mo. App. 328, 6 St. Ry. Rep. 786, 97 S. W. 218.

**31.** *Salmon v. City Electric Ry. Co.*, 124 Ga. 1056, 4 St. Ry. Rep. 160, 53 S. E. 575.

**32.** *Carrico v. West Virginia & P. Ry. Co.*, 35 W. Va. 389, 11 Ry. & Corp. L. J. 64, 14 S. E. 12; *Richmond & D. R. Co. v. Scott*, 16 Va. L. J. 362, 52 Am. & Eng. R. Cas. 405, 16 L. R. A. 91, 14 S. E. 763; *Texas & P. R. Co. v. Overall*, 82 Tex. 247, 18 S. W. 142.

**33.** *Coleman v. Second Ave. R. Co.*, 114 N. Y. 609, 21 N. E. 1064; *Cummings v. Worcester, etc., R. Co.*, 166 Mass. 220, 5 Am. & Eng. R. Cas. N. S. 389, 44 N. E. 126; *Tanner v. Buffalo Ry. Co.*, 72 Hun (N. Y.) 465, 54 St. Rep. (N. Y.) 776; *Third Ave. R. Co. v. Barton*, (U. S. C. C. A., N. Y.) 107 Fed. 215, 46 C. C. A. 241, 52 L. R. A. 471, and the fact

jected his head beyond the side of a car and came in contact with a trolley pole about seventeen inches from the side of the car, it was held that he was guilty of contributory negligence as a matter of law.<sup>34</sup>

§ 357. **Contributory negligence of children.** — In entering, riding upon, and leaving street cars a boy ten years of age or over is bound to exercise prudence equal to his care, knowledge, and experience, and to that extent is held responsible in law for acts of omissions contributory to his own injury.<sup>35</sup> So where a boy nine years of age alighted from a car and passing in rear of the same was struck by a car on a parallel track, it was declared that the question of his negligence should be controlled by the rule that a minor's responsibility for his conduct is the caution usually displayed by ordinary children of his age and capacity.<sup>36</sup> A boy fourteen years old is not, as matter of law, free from contributory negligence in trying to board an electric car followed by a trailer moving at the rate of from three to seven miles an hour.<sup>37</sup> If a boy ten years old fall from the platform or car steps because of his own imprudence, the carrier is not liable merely because the conductor called him to the platform when about to reach his destination and while giving the signal to stop.<sup>38</sup> Where a child about six years of age was injured while attempting to mount the front platform of a street car while the driver, who was also the

that plaintiff was acting in obedience to the invitation or direction of the conductor, or that the conductor obstructed his passage, did not absolve him from the duty of exercising reasonable prudence and care for his own safety.

**34.** *Huber v. Cedar Rapids & M. C. Ry. Co.*, 124 Iowa 556, 3 St. Ry. Rep. 245, 100 N. W. 478.

**35.** *Little Rock Tract. & E. Co. v. Nelson*, 66 Ark. 494, 52 S. W. 7; *Baltimore City Pass. R. Co. v. McDonnell*, 43 Md. 534; *Phila. City Pass. Ry. Co. v. Hassard*, 75 Pa. St. 367.

**36.** *Fry v. St. Louis Transit Co.*, 111 Mo. App. 324, 3 St. Ry. Rep. 581, 85 S. W. 960.

**37.** *Sly v. Union Depot R. Co.*, 134 Mo. 681, 36 S. W. 235; *Chicago City Ry. Co. v. Wilcox*, (Ill.) 24 N. E. 419, 8 L. R. A. 494; *Erie City Pass. Ry. Co. v. Schuster*, 113 Pa. St. 412, 6 Atl. 269; *Mowrey v. Central City Ry. Co.*, 66 Barb. (N. Y.) 43; *Swift v. Staten Island R. T. Co.*, 123 N. Y. 645, 25 N. E. 378.

**38.** *Cronan v. Crescent City R. Co.*, 49 La. Ann. 65, 21 So. 163.

conductor, was on the rear platform, the company was held not liable.<sup>39</sup> And a boy, injured in attempting to get on the rear platform of a car while in motion, cannot recover for injuries sustained where the operators of the car were not aware of his intention to get aboard.<sup>40</sup> Nor is the carrier liable for the death of a seven-year-old boy caused by his falling from a car in which he was riding without permission while voluntarily attempting to alight while the car was moving.<sup>41</sup> But where a young girl is boarding a street car, and has hold of the handrail when it starts, it is not contributory negligence for her to hold onto the rail, even though it causes her to be dragged half a block.<sup>42</sup> Where a boy sixteen years of age, a passenger on defendant's street car, the rear platform being too crowded to allow him to get on, got on the front platform, which was also crowded, standing with one foot on the platform and the other on the step, holding to the dashboard rail; the conductor ran forward to get on the front platform, and at the first attempt failed, and on a second attempt, calling out for the passengers to make room for him, hit against plaintiff, and he and the conductor were immediately forced off, and he was run over; the questions of negligence and contributory negligence were held to be properly submitted to the jury.<sup>43</sup> So, whether it was contributory negligence for a boy thirteen years of age to sit on the platform of an electric car, resting his feet on the lower step, was held to be a question for the jury, since, the defendant not attempting to prevent passengers riding upon the steps, and having accepted the plaintiff as a passenger while occupying the position he did, the question of negligence was at least one concerning which reasonable minds might differ.<sup>44</sup> A street railway company

**39.** Hestonville Passenger Ry. Co. v. Connell, 88 Pa. St. 520.

**40.** West Chicago St. R. Co. v. Pinder, 51 Ill. App. 420; Bishop v. Union R. Co., 14 R. I. 314.

**41.** Brightman v. Union St. R. Co., 167 Mass. 113, 44 N. E. 1091.

**42.** Schoenfelt v. Met. St. Ry. Co., 40 Misc. Rep. (N. Y.) 201, 81 N. Y. Supp. 644.

**43.** Gray v. Met. St. Ry. Co., 39 App. Div. (N. Y.) 536, 57 N. Y. Supp. (91 St. Rep.) 587. And see Garoni v. Campagne Nationale de Navigation, 131 N. Y. 614; affg. 39 St. Rep. (N. Y.) 63, 14 N. Y. Supp. 797.

**44.** Seller v. Market St. Ry. Co., 1 St. Ry. Rep. 9, and notes, 139 Cal. 268, 72 Pac. 1006.

owes the duty of preventing children of such tender years that negligence cannot be imputed to them from being on the platform of a moving car, and, if such a child gets there without permission, failure to remove it from its position of danger as soon as it is discovered is negligence.<sup>45</sup> Parents are not guilty of contributory negligence *per se* in permitting a boy of ten years, bright and healthy, to go upon an errand two miles away and return by a train which he knew would be signaled to stop near his home, and would stop when signaled, which will prevent a recovery by them for injuries sustained by the boy in jumping off the train upon the conductor's refusal to stop.<sup>46</sup> How much experience and what degree of intelligence a child must evince before negligence can be imputed to him can never be determined as a matter of law. The age, the person, the circumstances surrounding the accident must all be taken into consideration and the jury determines the question as a matter of fact.<sup>47</sup>

**§ 358. Contributory negligence of infirm persons.** — A carrier does not owe to every passenger precisely the same care without respect to age, sex, or bodily infirmity.<sup>48</sup> If a passenger be evidently crippled, or infirm, or very young, the duty of the carrier

**45.** *Levin v. Second Ave. Tract. Co.*, 201 Pa. St. 58, 50 Atl. 225; *Barre v. Railway Co.*, 155 Pa. St. 170, 26 Atl. 99.

**46.** *Avery v. Galveston H. & S. A. R. Co.*, 81 Tex. 243, 26 Am. St. Rep. 809, 16 S. W. 1015.

**47.** *Barksdull v. New Orleans & C. R. Co.*, 23 La. Ann. 180; *McMahon v. Northern Cent. Ry. Co.*, 39 Md. 438; *Hestonville Pass. Ry. Co. v. Connell*, 88 Pa. St. 520; *Oldfield v. New York & H. R. Co.*, 14 N. Y. 310; *affg.* 3 E. D. Smith 103; *Washington & G. Ry. Co. v. Gladmon*, 15 Wall. (U. S.) 401; *Brown v. European & N. A. Ry. Co.*, 58 Me. 384; *Nagle v. Allegheny V. R. Co.*, 88 Pa. St. 35;

*St. Claire St. Ry. Co. v. Eadie*, 43 Ohio St. 91, 54 Am. Rep. 144; *West-erfield v. Levis*, 43 La. Ann. 63, 9 So. 52; *Government St. R. Co. v. Hanlon*, 53 Ala. 70; *Farris v. Cass Ave., etc., Ry. Co.*, 80 Mo. 325. See other cases cited elsewhere as to contributory negligence of children and their parents, guardians, or custodians.

**48.** *St. Louis, A. & T. R. Co. v. Finlay*, 79 Tex. 85, 15 S. W. 266; *Schiller v. Dry Dock, E. B. & B. R. Co.*, 26 Misc. Rep. (N. Y.) 392, 56 N. Y. Supp. (90 St. Rep.) 184.

See section — herein as to duty to aged, infirm, and helpless persons.

toward him while boarding the car or alighting, or while remaining in the car, must be performed with due regard to such apparent condition.<sup>49</sup> A passenger has a right to rely on the carrier's furnishing her a reasonably safe place to alight, and the fact that she is old, crippled, and deaf, and is traveling alone, and has not arranged for any one to meet her, does not, as a matter of law, constitute contributory negligence.<sup>50</sup> But where a passenger in alighting from a car did not ask for assistance, though having an opportunity, nor inform the servants in charge of the weakness of her ankle, nor look to see whether the place to alight was safe, she was negligent, precluding recovery for an injury received.<sup>51</sup> Knowledge communicated to one employee upon a car that a passenger is feeble and will need assistance in getting off is notice to the carrier; and it is not necessary to notify the conductor or the one in charge of the car;<sup>52</sup> and a conversation which plaintiff had with the conductor on entering the car is competent to show that he knew that the plaintiff was a cripple.<sup>53</sup>

**49.** *Ridenhour v. Kansas City Cable R. Co.*, 102 Mo. 283, 14 S. W. 760; *Sheridan v. Brooklyn & N. R. Co.*, 36 N. Y. 39, 34 How. Pr. (N. Y.) 217; *McCann v. Newark & So. R. Co.*, 58 N. J. L. (29 Vroom) 642, 34 Atl. 1052, 4 Am. & Eng. R. Cas. 382, 33 L. R. A. 127; *Indianapolis P. & C. R. Co. v. Pitzer*, 109 Ind. 179, 6 N. E. 310, 10 N. E. 70; *East Line & R. Co. v. Rushing*, 69 Tex. 306, 6 S. W. 834; *Shenandoah Val. R. Co. v. Moose*, 83 Va. 827, 3 S. E. 796; *Lake Shore & M. S. R. Co. v. Salzman*, 52 Ohio St. 558, 40 N. E. 891, 31 L. R. A. 261; *Atchison, T. & S. F. R. Co. v. Weber*, 33 Kan. 543; *Louisville, etc., R. Co. v. Fleming*, 14 Lea (Tenn.) 128; *Columbus, C. & I. C. R. Co. v. Powell*, 40 Ind. 37.

**50.** *Texas & P. Ry. Co. v. Reid*, (Tex. Civ. App.) 74 S. W. 99; *St. Louis S. W. Ry. Co. v. Ferguson*, 26 Tex. Civ. App. 460, 64 S. W. 797.

**51.** *Young v. Missouri Pac. Ry. Co.*, 93 Mo. App. 267.

**52.** *Foss v. Boston & M. R. Co.*, 66 N. H. 256, 21 Atl. 222, 11 L. R. A. 367, 47 Am. & Eng. R. Cas. 566; *Croom v. Chicago, M. & St. P. R. Co.*, 52 Minn. 296, 38 Am. St. Rep. 557, 53 N. W. 1128, 18 L. R. A. 602, 7 Am. Ry. & Corp. Rep. 468. The carrier is not liable for the death by heart disease of a passenger, who was rudely and roughly removed from the car by the driver under the mistaken impression that he was drunk, and placed on the sidewalk, where, soon after, he died; there being nothing to show that it was not the disease that killed him, or that the driver's wrongful acts in any manner produced or hastened his death. *Briggs v. Minneapolis*, 52 Minn. 36, 53 N. W. 1019.

**53.** *Louisville, etc., R. Co. v. Bowlds*, 23 Ky. L. Rep. 1212, 64 S. W. 957.

Where an elderly man requested a street car driver to stop and permit him to alight and was rudely answered, he cannot recover if he be injured in attempting to jump from the car while in slow motion without any notice to the driver of his intention, although his injury was occasioned by a sudden jerk of the car as the team drawing it were struck by a whip just as he was alighting.<sup>54</sup> The carrier is not chargeable with notice that a passenger more than fifty years of age has ridden on a cable car only once or twice and does not understand the manner of receiving and discharging passengers.<sup>55</sup> But appearance alone is no excuse for a mistake on the part of the carrier's servant; thus, if he forcibly remove from the street car one suffering from St. Vitus dance, or one being in a weak condition from the administration of anæsthetics by a physician, under the mistaken notion that he is intoxicated, a rule of the company requiring conductors not to allow intoxicated persons on the car affords no protection.<sup>56</sup> Whether one is negligent, however crippled or otherwise disabled, in attempting to board a moving car is generally a question for the jury under the circumstances of the case.<sup>57</sup>

**§ 359. Traveling in violation of statute not contributory negligence.** — The duty imposed by law upon the carrier of passengers to carry safely, so far as human skill and foresight can go, the persons it undertakes to carry, exists independently of contract, and although there is no contract in a legal sense between the parties. The law raises the duty out of regard for human life, and for the purpose of securing the utmost vigilance by carriers in protecting those who have intrusted themselves to their hands.

**54.** *Outen v. N. & S. St. R. Co.*, 94 Ga. 662, 21 S. E. 710.

**55.** *Jackson v. Grand Ave. R. Co.*, 118 Mo. 199, 24 S. W. 192.

**56.** *Regner v. Glens Falls, S. H. & Ft. E. St. R. Co.*, 74 Hun (N. Y.) 202, 56 St. Rep. (N. Y.) 300, 26 N. Y. Supp. 625; *Watson v. Oswego St. Ry. Co.*, 7 Misc. Rep. (N. Y.)

562, 58 St. Rep. (N. Y.) 356, 28 N. Y. Supp. 84.

**57.** *Cincinnati, H. & B. R. Co. v. Nolan*, 8 Ohio C. C. 347; *Shaughnessy v. Consol. Tract. Co.*, 17 Pa. Super. Ct. 588; *Baltimore Tract. Co. v. State, Ringgold*, 78 Md. 409, 58 Am. & Eng. R. Cas. 200, 28 Atl. 397.

A breach of this duty is a breach of the law, and whether there is a contract to carry, or the service undertaken is gratuitous, an action lies against the carrier for this breach resulting in the negligent injury of a passenger. The liability of the carrier is the same, whether the action is brought upon contract or upon the duty, and the evidence requisite to sustain the action in either form is substantially the same, and when there is an actual contract to carry, it is properly said that the liability in an action founded upon the public duty is co-extensive with the liability on the contract. Such a case, therefore, is not within the principle which forbids a recovery upon a contract made in respect to a matter prohibited by law, or for a cause of action which requires the proof of an illegal contract to support it, because the injured person happens to be unlawfully traveling on Sunday. The relation of carrier and passenger existing between the parties, and the negligence of the carrier being established, the courts have refused to deny relief on the ground that to allow it would contravene the general policy of the statute prohibiting Sunday travel, or that the duty which the law in general imposes upon carriers to carry safely does not exist in respect to wrongdoers who are traveling in violation of the statute. It is now almost invariably held that the plaintiff's violation of the collateral statutory duty cannot be regarded in law as an efficient or proximate cause of the injury, and hence is not such contributory negligence as will bar his right to recover and is no defense to the action.<sup>58</sup> The courts of Massachusetts, Maine, and Vermont and perhaps of some other States have in their earlier decisions taken a different

58. *Carroll v. Staten Island R. Co.*, 58 N. Y. 126, 134, 17 Am. Rep. 221; *Platz v. City of Cohoes*, 89 N. Y. 219, 42 Am. Rep. 286; *Delaware, etc., R. Co. v. Trautwein*, 52 N. J. L. 169, 19 Am. St. Rep. 442, 19 Atl. 178, 1 Am. Ry. & Corp. Rep. 688; *Schmid v. Humphrey*, 48 Iowa 652, 30 Am. Rep. 414; *Opsahl v. Judd*, 30 Minn. 129; *Phila., etc., R. Co. v.*

*Lehman*, 56 Md. 209, 40 Am. Rep. 415; *Norris v. Litchfield*, 35 N. H. 271; *Covey v. Bath*, 35 N. H. 530; *Baldwin v. Barney*, 12 R. I. 392, 34 Am. Rep. 670; *Sutton v. Wauwatosa*, 29 Wis. 21, 9 Am. Rep. 534; *Swisher v. Williams, Wright (Ohio)* 754; *Knowlton v. Milwaukee City Ry. Co.*, 50 Mo. 278; *Eagan v. Maguire*, 21 R. I. 189, 193, 42 Atl. 506; *Taylor v.*

view; <sup>59</sup> but the former States have since provided by statute that such a defense shall not be available in actions for personal injuries, and the later decisions in other States now conform to the principles of the rule above stated. <sup>60</sup>

§ 360. **Entering conveyance.** — It cannot be said, as a matter of law, that it is always negligent for a person to get upon a street car while it is in motion. <sup>61</sup> Ordinarily it is perfectly safe to get

Star Coal Co., 110 Iowa 40, 81 N. W. 249; *City of Kansas City v. Orr*, 32 Kan. 61, 61 Pac. 397.

**59.** *Feital v. Middlesex R. Co.*, 109 Mass. 398, 12 Am. Rep. 720; *Smith v. Boston & M. R. Co.*, 120 Mass. 490, 21 Am. Rep. 538; *Doyle v. Lynn & B. R. Co.*, 118 Mass. 195, 19 Am. Rep. 431; *Day v. Highland St. Ry. Co.*, 135 Mass. 113, 40 Am. Rep. 447; *Bucher v. Fitchburg R. Co.*, 131 Mass. 156, 41 Am. Rep. 216; *Cratty v. City of Bangor*, 57 Me. 423, 2 Am. Rep. 56; *Davidson v. City of Portland*, 69 Me. 116, 31 Am. Rep. 253; *Johnson v. Town of Irasburgh*, 47 Vt. 28, 19 Am. Rep. 111; *Holcomb v. Town of Danby*, 51 Vt. 428; *Beacham v. Portsmouth Bridge*, 68 N. H. 382, 40 Atl. 1066.

**60.** *Maine Laws 1895*, chap. 129; *Mass. Stat. 1884*, chap. 37; *McDonough v. Metropolitan R. Co.*, 137 Mass. 210; *Cleveland v. Bangor*, 87 Me. 259, 5 Am. Electl. Cas. 346, 32 Atl. 892, 47 Am. St. Rep. 326; *Jordan v. New York, N. H. & H. R. Co.*, 165 Mass. 346, 32 L. R. A. 101, 43 N. E. 111; *Boyden v. Fitchburg R. Co.*, 70 Vt. 125, 10 Am. & Eng. R. Cas. N. S. 523, 30 Atl. 771. A railroad company is not relieved from liability for negligently killing a person at a railroad crossing because he was traveling on Sunday in viola-

tion of the Vermont statute, where his act did not contribute to the injury. *Hoadley v. International Paper Co.*, 72 Vt. 79, 47 Atl. 169.

**61.** *Phillips v. Rensselaer & Saratoga R. Co.*, 49 N. Y. 177; *Morrison v. Erie R. Co.*, 56 N. Y. 302; *Mettlesstadt v. Ninth Ave. R. Co.*, 4 Robt. (N. Y.) 377; *Burrows v. Erie R. Co.*, 63 N. Y. 556. Trying to board a car in rapid motion is negligence. *Chicago City Ry. Co. v. Delcourt*, 35 Ill. App. 430. In an action against a railroad company for injuries the defendant requested the court to charge that if plaintiff undertook to board the train while in motion, and was injured, she was guilty of contributory negligence, and the court added: "Unless she was directed by some employee of defendant in charge of the train, and her obedience to such instruction would not lead her into apparent danger, such as a prudent person would not assume." *Held*, that the instruction as given was a correct statement of the law. *Pence v. Wabash R. Co.*, 90 N. W. 59, 116 Iowa 279.

**Plaintiff signaled a street car** approaching the crossing on which he was standing to stop, and it slowed down, but did not stop completely, whereupon he attempted to board it while in motion, and after it had

upon a street car moving slowly, and thousands of people do it every day with perfect safety. But there may be exceptional cases, when the car is moving rapidly, or when the person is infirm or clumsy, or is incumbered with children, packages, or other hindrances, or when there are other unfavorable conditions, when it would be reckless to do so, and a court might, upon undisputed evidence, hold as matter of law that there was negligence in doing so. But in most cases it must be a question for the jury, to be determined by them under all the circumstances of the case.<sup>62</sup>

passed the crossing, and in doing so was injured. It did not appear that the slowing down of the car was in response to plaintiff's signal. *Held*, that plaintiff was guilty of contributory negligence. *Reidy v. Met. St. Ry. Co.*, 27 Misc. Rep. (N. Y.) 527, 58 N. Y. Supp. 326.

**62.** *Alabama.* — *North Birmingham Ry. Co. v. Liddicoat*, 99 Ala. 545, 13 So. 18.

*Arkansas.* — *Railway Co. v. Atkins*, 46 Ark. 423.

*California.* — *Finkeldey v. Omnibus Cable Co.*, 114 Cal. 28, 45 Pac. 996.

*District of Columbia.* — *Brown v. Washington & G. R. Co.*, 25 Wash. L. Rep. 404, 11 App. D. C. 37.

*Illinois.* — *Chicago Union Traction Co. v. Lundohl*, 215 Ill. 289, 4 St. Ry. Rep. 183, 74 N. E. 155; *Chicago Union Traction Co. v. Hawthorn*, 211 Ill. 367, 3 St. Ry. Rep. 141, 71 N. E. 1022; *North Chicago St. R. Co. v. Wiswell*, 168 Ill. 613, 48 N. E. 407, 9 Am. & Eng. R. Cas. N. S. 377; *Cicero & Perviso St. Ry. Co. v. Meixner*, 160 Ill. 320, 6 Am. Electl. Cas. 404, 43 N. E. 823, 31 L. R. A. 331; *Railway Co. v. Williams*, 140 Ill. 275, 29 N. E. 672; *South Chicago City R. Co. v. Dufresne*, 102 Ill. App. 493; *affd.*, 200 Ill. 456, 65 N. E. 1075;

*North Chicago St. R. Co. v. Kaspers*, 85 Ill. App. 316; *affd.*, 57 N. Y. 849, 186 Ill. 246.

*Indiana.* — *Citizens' St. Ry. Co. v. Jolly*, 1 St. Ry. Rep. 157, 161 Ind. 80, 67 N. E. 935; *Illinois C. R. Co. v. Cheek*, 152 Ind. 663, 53 N. E. 641, 1 Rep. 975; *Citizens' St. Ry. Co. v. Spaher*, 7 Ind. App. 23, 33 N. E. 446, 4 Am. Electl. Cas. 416.

*Kansas.* — *Railroad Co. v. McCandless*, 33 Kan. 366, 6 Pac. 587.

*Kentucky.* — *Central Pass. R. Co. v. Rose*, 15 Ky. L. Rep. 209, 22 S. W. 745, 4 Am. Electl. Cas. 429.

*Louisiana.* — *Pitard v. New Orleans Ry. & L. Co.*, 120 La. 925, 6 St. Ry. Rep. 509, 45 So. 943; *Ober v. Crescent City R. Co.*, 44 La. Ann. 1059, 11 So. 818, 52 Am. & Eng. R. Cas. 576. See *Jones v. Canal & Carondelet R. Co.*, 109 La. 213, 33 So. 200.

*Maryland.* — *N. Y., P. & N. R. Co. v. Coulbourn*, 69 Md. 360, 16 Atl. 208; *Baltimore & O. R. Co. v. Kane*, 13 Atl. 387, 69 Md. 11, 9 Am. St. Rep. 387.

*Massachusetts.* — *Corlin v. West End St. Ry. Co.*, 4 Am. Electl. Cas. 406, 154 Mass. 197, 27 N. E. 1000; *McDonough v. Met. R. Co.*, 137 Mass. 210.

*Minnesota.* — *Sahlgaard v. St.*

The Pennsylvania courts hold that to step on or off a moving car is *per se* negligence, and the burden is upon the plaintiff to clearly demonstrate to the court why his case should go to the jury as a rare exception to this rule.<sup>63</sup> The authorities of other States

Paul City Ry. Co., 48 Minn. 232, 51 N. W. 111; *Schepers v. Union Depot R. Co.*, 126 Mo. 665, 29 S. W. 712, 5 Am. Electl. Cas. 398; *Hansberger v. Sedalia El. Ry. & L. Co.*, 82 Mo. App. 566; *Wyatt v. Railway Co.*, 55 Mo. 485; *Spencer v. St. Louis Transit Co.*, 111 Mo. App. 653, 3 St. Ry. Rep. 554, 86 S. W. 593; *McKee v. St. Louis Transit Co.*, 108 Mo. App. 470, 3 St. Ry. Rep. 555, 83 S. W. 1013; *Leu v. St. Louis Transit Co.*, 106 Mo. App. 329, 3 St. Ry. Rep. 558, 80 S. W. 273; *Eikenbury v. St. Louis Transit Co.*, 103 Mo. App. 442, 3 St. Ry. Rep. 557, 80 S. W. 360.

*Nebraska.* — *Omaha St. Ry. Co. v. Martin*, 6 Am. Electl. Cas. 417, 48 Neb. 65, 66 N. W. 1007, 6 Am. Electl. Cas. 417.

*New Jersey.* — *Murphy v. North Jersey St. Ry. Co.* 71 N. J. L. 5, 3 St. Ry. Rep. 652, 58 Atl. 1018.

*New York.* — *Moylan v. Second Ave. R. Co.*, 128 N. Y. 583, 37 St. Rep. (N. Y.) 871, 27 N. E. 977; *Eppendorf v. Brooklyn City & N. R. Co.*, 69 N. Y. 195, 25 Am. Rep. 171; *Clinton v. Brooklyn Heights R. Co.*, 91 App. Div. 374, 2 St. Ry. Rep. 791, 86 N. Y. Supp. 932; *Berry v. Utica Belt Line St. R. Co.*, 76 App. Div. (N. Y.) 490, 78 N. Y. Supp. 542; *Munroe v. Third Ave. R. Co.*, 18 J. & S. (N. Y.) 114; *Sexton v. Met. St. Ry. Co.*, 57 N. Y. Supp. 577, 26 Misc. Rep. (N. Y.) 432.

*Pennsylvania.*—See *Picard v. Ridge Ave. Pass. R. Co.*, 147 Pa. St. 195, 1 Pa. Adv. Rep. 218, 23 Atl. 566; *Stager v. Ridge Ave. Pass. R. Co.*,

119 Pa. St. 70, 12 Atl. 821. But see in this State cases cited in following note.

*Texas.* — *Lewis v. Houston Electric Co.*, 39 Tex. Civ. App. 625, 4 St. Ry. Rep. 1032, 88 S. W. 489, 112 S. W. 593.

As to duty and liability of street railway company to persons boarding car, see sections 300, 301, 302, herein.

**63.** *Hunterson v. Union Trac. Co.*, 1 St. Ry. Rep. 697, 205 Pa. St. 568, 55 Atl. 543, holding that no recovery can be permitted where it appears that the plaintiff signals an approaching train to stop, whose signal is heeded, but who, before it stops, and while running at a speed of three or four miles an hour, attempts to get on a car; citing *Powelson v. United Trac. Co.*, 204 Pa. St. 474, 54 Atl. 282; *Stager v. Ridge Ave. Pass. Ry. Co.*, 119 Pa. St. 70, 12 Atl. 821; *Walters v. Phila. Trac. Co.*, 161 Pa. St. 36, 28 Atl. 941; *Jagger v. People's Pass. Ry. Co.*, 180 Pa. St. 436, 36 Atl. 436. In the *Hunterson* case the court said: "The duty of the plaintiff was to get on a car that had stopped. His signal to the motorman clearly was to stop and not merely to slow up. The motorman so understood it, and was slackening the speed of the car, that he might stop at the usual stopping place. The slackened speed was not notice to plaintiff to get on the moving car, but was that it would come to a full stop, if he would wait. No other inference can be drawn. But the plaintiff, impatient, as many of us so often are,

quite generally sustain the opposite view. Street railway companies are incorporated for the purpose of carrying passengers in towns and cities and along suburban highways in thickly populated communities. To accommodate their patrons, they are required to stop frequently, and should stop at the intersection of streets, to receive and discharge passengers. They are common carriers, and the public has a right to demand of them a service that will give it frequent opportunities for entering and leaving their cars with safety. Hence they are expected to stop at the intersections of streets, if not oftener, so that those who desire may avail themselves of the service of the cars. The passenger enters and leaves the car quickly. It is a matter of common observation that great numbers of people board the car and leave it while it is in motion. This is permitted by the conductor, and by his action he very frequently invites it. This is the very well understood way in which street cars are operated in this country, and, therefore, a large percentage of passengers act upon the assumption that they are expected by the company to enter and depart from a car when it arrives at a crossing, whether it has entirely stopped or not. That this can be done with perfect safety if the car is moving slowly, is the hourly experience of thousands of people. It presupposes, of course, that the person attempting it has the use of his faculties and his limbs, and that there is no obstruction on or near the platform that would interfere with or prevent access to or departure from the car. Why, then, should such action on the part of the passenger be declared negligence *per se*? What is done with such frequency, and with the tacit acquiescence of the company's servants, by great numbers of people, who evidently regard it as safe, cannot be characterized as negligence in itself. On the contrary, the proper and logical inference from

even of a second's delay, tried to board the moving car, instead of waiting until he could safely get on it; and in so doing he voluntarily assumed the risk of experiencing just what happened to him." The dissenting opinion in this case claims that

the authorities cited in the prevailing opinion do not sustain its position, but on the contrary are in harmony with the decisions of the other States that it is not negligence *per se* to attempt to board a car while in motion.

such action is that it is not attended with danger, and hence that it does not disclose a want of care. A reasonably prudent man would not attempt to get on or off a rapidly moving street car, as the danger would be apparent, and, if he did so, his act would convict him of negligence; but, should he enter or alight from a car almost at rest, the circumstances would be different, and the character of his act must be determined in the light of those circumstances. In the former the rapidity of the car would make the danger apparent to the dullest intellect; in the latter, the speed of the car would raise no doubt in the mind of a prudent man that he could accomplish the act with safety.<sup>64</sup> If the passenger be in good physical condition and unincumbered, he may, without negligence, attempt to board a slowly moving car under all ordinary circumstances, and it will be even a question for the jury if in boarding he was negligent in not holding fast to the handrail provided for the purpose of aiding him to board.<sup>65</sup> And though a person's

**64.** *Per* MESTREZAT, J., *Hunterson v. Union Trac. Co.*, 205 Pa. St. 568, 55 Atl. 543, 1 St. Ry. Rep. 697; *Cicero & P. St. R. Co. v. Meixner*, 160 Ill. 320, 31 L. R. A. 331, 43 N. E. 823. The court in this case said: "The doctrine is established in nearly all of the States where the question has arisen that it is not negligence *per se* for a passenger to board or alight from a street car operated by horse power, and the question of contributory negligence is one for the jury. It would be impossible for a court to lay down a rule as to what particular rate of speed would be sufficient notice to a passenger that, if he attempted to get on or off, he would be held guilty of contributory negligence. It would also be a great hardship and unjust to lay down a general rule that a passenger attempting to board a street car while in motion at all should be held guilty of contributory negligence." The

court also considered the question whether the rule as to persons boarding or alighting from horse cars should apply to electric cars, and concludes as follows: "While in electric cars the possibilities of speed are greater than in the case of horse cars, yet the general operation and management of such cars so nearly approach those of horse cars that it must be held that the same rule of law which in the cases cited and a long line of other cases holds that it is not negligence *per se* to board or depart from such cars while in motion is also applicable to electric cars."

It is negligence as a matter of law for a person to attempt to board a car going at a speed of eight or ten miles an hour. *Spencer v. St. Louis Transit Co.*, 111 Mo. App. 653, 3 St. Ry. Rep. 554, 86 S. W. 593.

**65.** *Martin v. Second Ave. R. Co.*, 3 App. Div. (N. Y.) 448, 38 N. Y.

act in boarding a moving car may be negligent, yet if he gains a place of safety on the car and is then thrown by a sudden jerking of the car, the company's negligence will be considered as the cause of the injury, and it will be liable.<sup>66</sup> But although a person attempting to board a moving car is not negligent as a matter of law, yet when the fact that the car is in motion is the sole producing cause of the injury, the risk of the occurrence is one which the person making the attempt must be held to have assumed.<sup>67</sup> And where it is claimed that the injuries were caused by the negligent act of a conductor in causing the speed of a slowly moving street car to be accelerated while plaintiff was attempting to board it so that he was thrown back against the end of a plank projecting from a barrier surrounding an excavation in the street, whereby he was swept from the step of the car and thereby injured, and it appears that he was aware of the existence of the barrier prior to the date of the accident, and that at the time he attempted to board the car he stood in a well-lighted place and within three or four feet of the barrier, his contributory negligence was held to be established as a matter of law.<sup>68</sup> A person in boarding a moving car does not assume the risk of injury from a sudden and negligent increase of the motion of the car.<sup>69</sup> Evidence that a person injured in attempting to board a street car had been frequently seen to get on and off street cars while in motion has been held to be properly excluded.<sup>70</sup> The controversy being whether defendant's street railway train, which ran over plaintiff's intestate as he attempted to board it, was moving slowly, as testified by plaintiff's witnesses, or rapidly, as testified by

Supp. 220, 73 St. Rep. (N. Y.) 714;  
Morrison v. Broadway & S. A. R. Co.,  
130 N. Y. 166, 41 St. Rep. (N. Y.)  
248, 29 N. E. 105.

**66.** Boulfrois v. United Trac. Co.,  
210 Pa. St. 263, 3 St. Ry. Rep. 766,  
59 Atl. 1007.

**67.** Murphy v. North Jersey St.  
Ry. Co., 71 N. J. L. 5, 3 St. Ry. Rep.  
652, 58 Atl. 1018.

**68.** Berry v. Utica Belt Line St.  
Ry. Co., 181 N. Y. 198, 3 St. Ry. Rep.  
654, 73 N. E. 970; revg. 87 App. Div.  
620, 83 N. Y. Supp. 1102.

**69.** Schmidt v. North Jersey St.  
Ry. Co., (N. J. L.) 3 St. Ry. Rep.  
652, 58 Atl. 72.

**70.** Lexington Ry. Co. v. Herring,  
29 Ky. L. Rep. 794, 5 St. Ry. Rep.  
332, 96 S. W. 558.

defendant's witnesses, plaintiff cannot show that it was defendant's custom to stop its cars near the point of the accident to take on passengers; this not being competent to corroborate plaintiff's evidence, and furnishing no excuse for attempting to mount a rapidly moving street car.<sup>71</sup>

§ 361. **Entering conveyance continued.** — It is the duty of a person intending to enter a car upon a highway to take a position outside the reach of an approaching car, for it is common knowledge that a car usually passes a person who has signaled it to stop so that he may enter by the rear end.<sup>72</sup> A person who gives the signal to the motorman to stop should stand at or reasonably near the place at which it is usual to stand in order to hail the car.<sup>73</sup> It is not negligent for a person to attempt to board a car with bundles in his arms and without taking hold of the railing where the car has been stopped for the purpose of permitting him to board it.<sup>74</sup> So it is not *per se* negligence for a person with an umbrella in one hand and a handkerchief in the other to board or attempt to board an electric car while it is in the act of stopping to receive passengers, and before it has come to a full stop.<sup>75</sup> But a person running after a car from the rear, and who seizes the handle bar and attempts to board the car after the signal to start has been given, assumes all the natural risks incident to such an attempt to board the car, and cannot hold the company responsible for injuries caused thereby.<sup>76</sup> And a boy fourteen years old is not, as matter of law, free from contributory negligence in trying

**71.** *West Chicago St. Ry. Co. v. Torpe*, 187 Ill. 610, 58 N. E. 607.

**72.** *Neale v. Springfield St. Ry. Co.*, 189 Mass. 351, 4 St. Ry. Rep. 473, 75 N. E. 702, citing *Cox v. South Shore & Berton St. Ry. Co.*, 182 Mass. 497, 55 N. E. 823; *Garvey v. Rhode Island Co.*, 26 R. I. 80, 58 Atl. 456, 16 Am. Neg. Rep. 581.

**73.** *Pitard v. New Orleans Ry. & L. Co.*, 120 La. 925, 6 St. Ry. Rep. 509, 45 So. 943.

**74.** *Normie v. Wheeling Traction Co.*, 57 W. Va. 132, 3 St. Ry. Rep. 913, 49 S. E. 1030. See *Jacques v. Sioux City Trac. Co.*, 124 Iowa 257, 3 St. Ry. Rep. 249, 99 N. W. 1069.

**75.** *White v. Atlantic Consol. R. Co.*, 92 Ga. 494, 17 S. E. 672. The rule is otherwise, however.

**76.** *Foster v. Seattle Elec. Co.*, 35 Wash. 177, 3 St. Ry. Rep. 912, 76 Pac. 995.

to board an electric car followed by a trailer moving at the rate of from three to seven miles an hour. He is required to exercise such care and caution as might reasonably be expected from one of his age, experience, and intelligence.<sup>77</sup> There is greater danger in getting on a trailer of a train than on the cars in front; at the moment that the rate of speed is increased it (the trailer) oscillates from one side to the other, and has a backward and forward motion that renders it more difficult for the one attempting to board to hold on. It is a dead weight, and its movements are not generally as regular as those of the motor car to which it is attached.<sup>78</sup> And where a young man, able-bodied and unincumbered, having motioned for an open car to stop upon a crosswalk, when it had nearly stopped put his foot on the step on the side of and near the middle of the car and took hold of the stanchion, and after the car had moved six or seven feet, he was struck by the wheel of a truck which was standing in the street, it was held that it was plaintiff's duty to see, before getting on the car, that there was no obstacle outside the car which would make it dangerous for him to attempt to get on board; and that if the injury was attributable to any negligence, it was, in part at least, that of the plaintiff.<sup>79</sup> It is not necessarily negligent for a passenger to board a street car knowing that the track is being repaired, and that there are iron poles in close proximity to the track on the side of the car on which he is about to enter.<sup>80</sup> But where the plaintiff testified that he signaled the company's motorman to stop; that the car was stopped, and as he stepped on the running-board the car was suddenly started, and he was carried about fifteen feet, and struck by a pillar of an elevated road; he was facing in the direction in which the car moved; several witnesses testified that the plaintiff jumped on the car while in motion, and swung himself along the running-board, and that the conductor warned him when

77. *Sly v. Union Depot R. Co.*, 134 Mo. 681, 36 S. W. 235.

78. *Pitard v. New Orleans Ry. & L. Co.*, 120 La. 925, 6 St. Ry. Rep. 509, 45 So. 943.

79. *Moylan v. Second Ave. R. Co.*,

128 N. Y. 583, 37 St. Rep. (N. Y.) 871, 27 N. E. 977. But see *San Antonio Trac. Co. v. Bryant*, 30 Tex. Civ. App. 437, 70 S. W. 1015.

80. *Citizens' St. Ry. Co. v. Merl*, 26 Ind. App. 284, 59 N. E. 491.

he boarded the car to look out for the pillar, it was held that the plaintiff was guilty of contributory negligence.<sup>81</sup> Where defendant's cars were so arranged that at the end of a line, and before starting back, it was necessary to raise a bar and lower a step on one side of the car; plaintiff was at the end of the line when a car arrived, and attempted to get on before the step was lowered, and as it was lowered it struck his knee; he was accustomed to taking the car at that point, and knew that the step must be lowered, but did not notice that it was not lowered until it struck him, and it was held that he took the risk of an injury incident to the condition of the car when he attempted to board it.<sup>82</sup> Where a passenger was injured as he was starting to board a car it was held that unless it was shown that the conductor should have seen the deceased, or that the latter was intending to board the car, before the signal to go ahead was given or before the car started, the conductor was not negligent.<sup>83</sup>

§ 362. **Entering conveyance by front platform.** — An attempt to board a stationary car by the front platform is not negligence *per se*.<sup>84</sup> But it has been held to be negligent, as matter of law, for a person, even in good physical condition and unincumbered, to attempt to get on the front platform of a car moving at an ordinary rate of speed of seven or eight miles an hour.<sup>85</sup> Where, however, provision is made to get on or off the front or rear platform, it may not be negligence to board by the front platform.<sup>86</sup> A

81. *Cassio v. Brooklyn Heights R. Co.*, 59 App. Div. (N. Y.) 617, 69 N. Y. Supp. 208.

82. *Clark v. Met. St. Ry. Co.*, 68 App. Div. (N. Y.) 49, 74 N. Y. Supp. 267.

83. *Woodman v. Seattle Electric Co.*, 42 Wash. 406, 4 St. Ry. Rep. 1071, 85 Pac. 23, citing *Foster v. Seattle Electric Co.*, 35 Wash. 177, 76 Pac. 995.

84. *Pfeffer v. Buffalo Ry. Co.*, 4 Misc. Rep. (N. Y.) 465, 24 N. Y.

Supp. 490, 54 St. Rep. (N. Y.) 342; *affd.*, 144 N. Y. 636, 39 N. E. 494, 64 St. Rep. (N. Y.) 868, 4 Am. Electl. Cas. 444.

85. *Woo Dan v. Seattle El. R. & P. Co.*, 5 Wash. 466, 32 Pac. 103, 58 Am. & Eng. R. Cas. 195.

86. *Peterson v. D., L. & W. R. Co.*, 9 Kulp (Pa.) 552. A boy seven years of age, injured in attempting to get upon the front platform of a street railroad car while starting, where no notice was given to the employees in

person attempting to board a trolley car in motion by way of the front platform is bound to exercise more care than he would had he waited to board by the rear step, or for the car to stop. The fact that there was a jerk or sudden movement of the car when plaintiff jumped on the step did not necessarily establish negligence of the motorman. It might have been the natural result of applying the brake to stop the car.<sup>87</sup> A passenger is not as matter of law guilty of negligence in entering a street car by the front platform at the invitation of the driver, and proceeding to her seat with her back to the horses, which will preclude her recovery for injuries from being thrown to the floor by the starting of the car, although the rear platform is the usual place for entering the car, and she did not use the straps placed in the car for passengers to take hold of.<sup>88</sup> Nor is one, as matter of law, guilty of contributory negligence in attempting to board the front platform of a street car while it is in motion, where he has given a signal and the driver has slackened the speed of his horses.<sup>89</sup> Where plaintiff boarded one of defendant's street cars at the front platform, and stood there because, according to his testimony, he could not open the door, and when the car ran on a curve he was thrown off and injured, an instruction that it was the duty of the

charge of the car and they had no knowledge of his intention and attempt to become a passenger, cannot recover against the company. Although there was no conductor on the car, the driver is not bound to look for passengers while engaged in attending to his horses. *Pitcher v. People's St. R. Co.*, 154 Pa. St. 560, 32 W. N. C. 243, 26 Atl. 559.

**87.** *Paulson v. Brooklyn City R. Co.*, 13 Misc. Rep. (N. Y.) 387, 5 Am. Electl. Cas. 419, 34 N. Y. Supp. 244.

**88.** *Holmes v. Alleghany Traction Co.*, 153 Pa. St. 152, 25 Atl. 640, if the intending passenger carried a package on his shoulder which obstructed his line of vision so that he

fell into an excavation while attempting to reach a slowly moving car. *Hanson v. Third Ave. R. Co.*, 27 Misc. Rep. (N. Y.) 524, 58 N. Y. Supp. 282. And see *Readington v. Phila. Trac. Co.*, 132 Pa. St. 154, 19 Atl. 28. It is negligence *per se* for a person weighing 200 pounds, and of low statute, to attempt to board a street car moving at the rate of six miles per hour, while both his hands are incumbered by packages. *Baltimore Trac. Co. v. State, Ringgold*, 28 Atl. 397, 78 Md. 409, 58 Am. & Eng. R. Cas. 290.

**89.** *Finkeldey v. Omnibus Cable Co.*, 114 Cal. 28, 45 Pac. 996, 5 Am. & Eng. R. Cas. N. S. 393.

plaintiff to get on the car by the rear platform, and seat himself if he could by reasonable effort, and that his failure to do so was negligence, was erroneous; there being no notice forbidding entrance at the front platform, or apparent danger in so doing, though he apparently might have entered by the rear door.<sup>90</sup>

§ 363. **Leaving conveyance — Generally.** — While it is the duty of the carrier, as we have shown, to stop his car at a usual and customary stopping place, when signaled by a passenger, and afford him a reasonable opportunity to alight in safety, a reciprocal duty devolves upon the passenger to use reasonable diligence in getting off.<sup>91</sup> The passenger may assume that he will have a reasonable time to alight; and if he be injured in alighting the jury may infer that the time was insufficient.<sup>92</sup> The question of his negligence is ordinarily one for the jury.<sup>93</sup> So it is not negligence *per se* to alight from a slowly moving car.<sup>94</sup> But the circumstances may be such, either as to speed, surroundings, or other

**90.** *Townsend v. Binghamton R. Co.*, 57 App. Div. (N. Y.) 234, 68 N. Y. Supp. 121.

**91.** *Paducah St. Ry. Co. v. Walsh*, 22 Ky. L. Rep. 532, 58 S. W. 431, and other cases cited under sections 308, 309, herein.

**92.** *District of Columbia*. — *Metropolitan R. Co. v. Jones*, 21 Wash. L. Rep. 646, 1 App. D. C. 200.

*Illinois*. — *North Chicago St. R. Co. v. Brown*, 178 Ill. 187, 52 N. E. 864; affg. 76 Ill. App. 654.

*Kentucky*. — *Belt El. R. Co. v. Tomlin*, 19 Ky. L. Rep. 433, 40 S. W. 925.

*Michigan*. — *Britton v. Grand Rapids St. R. Co.*, 90 Mich. 159, 51 N. W. 276.

*Missouri*. — *Cullar v. Missouri, K. & T. Ry. Co.*, 84 Mo. App. 340.

**93.** *United States*. — *Camden & S. Ry. Co. v. Rice*, 137 Fed. 326, 4 St. Ry. Rep. 788.

*Georgia*. — *Coursey v. Southern Ry. Co.*, 113 Ga. 297, 38 S. E. 866.

*Louisiana*. — *Aber v. Crescent City R. Co.*, 44 La. Ann. 1059, 11 So. 818, 52 Am. & Eng. R. Cas. 576.

*Massachusetts*. — *Meade v. Boston Elev. Ry. Co.*, 185 Mass. 327, 2 St. Ry. Rep. 456, 70 N. E. 197.

*Minnesota*. — *Currie v. Mendenhall*, 77 Minn. 179, 79 N. W. 677.

*Missouri*. — *Dawson v. St. Louis Transit Co.*, 102 Mo. App. 277, 2 St. Ry. Rep. 625, 76 S. W. 689.

*New Hampshire*. — *Hutchens v. Macomber*, 68 N. H. 473, 44 Atl. 602.

*New York*. — *Kuhlman v. Met. St. R. Co.*, 30 Misc. Rep. 417, 62 N. Y. Supp. 466; revg. 29 Misc. Rep. 773, 60 N. Y. Supp. 989.

*Ohio*. — *Holmes v. Ashtabula R. T. Co.*, 10 O. C. D. 638.

**94.** *Illinois*. — *Chicago Union Trac. Co. v. Hawthorn*, 211 Ill. 367, 3 St. Ry. Rep. 141, 71 N. E. 1022.

conditions, as to render a person alighting from a moving car guilty of contributory negligence precluding recovery for an in-

*Indiana.* — Indianapolis Street Ry. Co. v. Brown, 32 Ind. App. 130, 2 St. Ry. Rep. 250, 69 N. E. 407.

*Maryland.* — United Rys. & Elec. Co. v. Weir, 102 Md. 286, 4 St. Ry. Rep. 398, 62 Atl. 588.

*Michigan.* — Burke v. Bay City Trac. Co., 147 Mich. 172, 5 St. Ry. Rep. 518, 110 N. W. 524.

*Nebraska.* — Omaha St. Ry. Co. v. Craig, 39 Neb. 601, 58 N. H. 209.

*New York.* — Dickson v. Broadway, etc., R. Co., 41 How. Pr. 151.

*Utah.* — Paul v. Salt Lake City R. Co., 30 Utah 41, 4 St. Ry. Rep. 1049, 83 Pac. 563.

See note, 2 St. Ry. Rep. 994.

In the case of Newport News & O. P. Ry. & Elec. Co. v. McCormick, 106 Va. 517, 56 S. E. 281, it appeared that respondent, a passenger on one of appellant's cars, was injured by stepping from a car while in motion. The evidence for the respondent went to show that the accident was the result of the negligence of the motor-man in prematurely starting the car when the respondent was alighting, and the defense was that respondent stepped from the car when it was moving. Respondent obtained judgment and appellant brought error. The judgment was reversed for erroneous instructions. On the question of contributory negligence the court said:

"The court refused to instruct the jury, on behalf of the defendant, 'that while it is the duty of a common carrier of passengers to stop its cars and allow a passenger reasonable time to alight therefrom, if requested to do so, yet a failure to stop when

so requested does not justify a passenger in alighting or attempting to alight from a moving car; that it is the duty of the passenger under such circumstances to remain on the car until it has come to a stop and she can safely alight therefrom.'

"We are of opinion that the court did not err in refusing this prayer. It is certainly true as a general proposition that the misconduct of the conductor in carrying a passenger beyond his destination can afford no sufficient justification for his hazarding life or limb in jumping from a moving car. If, however, he should negligently persist in doing so and suffers injury, he is to be regarded as the author of his own misfortune, and his right to recover is barred, upon the principle that the negligence of the company in failing to stop the car was the remote, while the negligence of the plaintiff in leaping from the car while in motion was the proximate, cause of the injury. Jamison v. C. & O. Ry. Co., 92 Va. 327, 23 S. E. 758, 53 Am. St. Rep. 813; Washington, etc., R. Co. v. Lacey, 94 Va. 460, 26 S. E. 834; Blankenship v. C. & O. Ry. Co., 94 Va. 449, 27 S. E. 20; Outen v. North & South St. Ry. Co., (Ga.) 21 S. E. 710; Houston & Texas Cent. Ry. v. Leslie, 9 Am. & Eng. R. Cas. 407; L. S. & Mich. So. Ry. v. Bangs, 3 Am. & Eng. R. Cas. 426; Cent. R., etc., Co. v. Letcher, 12 Am. & Eng. R. Cas. 115; Lee v. Elizabeth, P. & C. J. Ry. Co., 1 St. Ry. Rep. 539 (N. J. Sup.) 55 Atl. 106.

"The general rule, however, formulated in the rejected instruction,

jury sustained.<sup>95</sup> The facts in each particular case must determine the question of negligence. If conditions exist arising from the negligence of the carrier, where great danger is apparent if the passenger remains on the car, or where he is told by the person in charge of the car to jump off, or where there are other peculiar circumstances which justify him in doing so, it would not be negligence for a passenger to alight from a car while the car was moving.<sup>96</sup> So, if the car is rapidly moving, an attempt to alight, being evidently dangerous, may be negligence as a matter of law.<sup>97</sup> But to attempt to alight from a car while it is in motion, and

is subject to the qualification that the question of whether the passenger has been guilty of such negligence as would bar a recovery in the particular case is a mixed question of law and fact, to be submitted to the determination of the jury under proper instructions. Such conduct does not necessarily constitute negligence *per se*; the criterion being that if, under all the circumstances, an ordinarily prudent person would have been warranted in attempting to alight from a moving car, negligence ought not to be imputed to a passenger who pursues that course. 5 Am. & Eng. Enc. of Law (2d ed.) 669; Booth on St. Rys., § 337; Filer v. N. Y. C. R. Co., (N. Y.) 10 Am. Rep. 327; St. L., etc., Ry. Co. v. Cantrell, (Ark.) 40 Am. Rep. 105; Lambeth v. N. C., etc., R. Co., (N. C.) 8 Am. Rep. 508; Western R. Co. v. Young, 51 Ga. 489."

**95.** *Alabama*. — Ricketts v. Birmingham St. Ry. Co., 85 Ala. 600, 5 So. 353.

*California*. — Joyce v. Los Angeles R. Co., 147 Cal. 274, 4 St. Ry. Rep. 78, 82 Pac. 204; French v. Pacific Electric Ry. Co., 1 Cal. App. 401, 4 St. Ry. Rep. 79, 82 Pac. 395.

*District of Columbia*. — Harmon v. Washington & G. R. Co., 6 Mackey 57.

*Georgia*. — Masterson v. Macon City, etc., R. Co., 88 Ga. 436, 14 S. E. 591.

*Illinois*. — West Chicago St. Ry. Co. v. McCafferty, 220 Ill. 476, 4 St. Ry. Rep. 204, 77 N. E. 153.

*Kentucky*. — South Covington, etc., St. Ry. Co. v. Reigleis Adm'r, 26 Ky. L. Rep. 666, 3 St. Ry. Rep. 291, 32 S. W. 382.

*New York*. — Greehy v. Metropolitan St. Ry. Co., 112 App. Div. 211, 4 St. Ry. Rep. 852, 98 N. Y. Supp. 274; Vonderohe v. Metropolitan St. Ry. Co., 109 App. Div. 28, 4 St. Ry. Rep. 853, 95 N. Y. Supp. 1048; Maloney v. Metropolitan St. Ry. Co., 95 App. Div. 393, 3 St. Ry. Rep. 716, 88 N. Y. Supp. 638.

*Pennsylvania*. — Jagger v. People's St. R. Co., 180 Pa. St. 436, 36 Atl. 867.

See note, 2 St. Ry. Rep. 994.

**96.** Campbell v. Los Angeles R. Co., 135 Cal. 137, 67 Pac. 50.

**97.** Jagger v. People's St. R. Co., 180 Pa. St. 436, 36 Atl. 867, 38 L. R. A. 786; White v. West End St. R. Co., 165 Mass. 522, 43 N. E. 298;

without the knowledge of the car employees that he desires to get off, is contributory negligence on the part of a passenger, and the employees were not guilty of negligence in increasing the speed of the car.<sup>98</sup> Where, in an action against a street railway company for personal injuries received by a passenger in alighting, alleged to have resulted from a premature starting of the car, there was no evidence that he had signaled the conductor or motorman to stop, or that either of them had notice of his intention to alight, or that the car had been started again with a knowledge on their part that he was in the act of alighting, the complaint should have been dismissed.<sup>99</sup> Where it appeared that after the conductor had announced the station, but before the car had stopped, the plaintiff alighted from the car in the night-time, without any emergency justifying such act, it was held that a nonsuit was properly granted.<sup>1</sup> And where it appeared that the jury rendered its verdict upon the testimony of the plaintiff alone, and disregarded the testimony of a number of defendant's witnesses, some of whom were passengers on the same car, to the effect that the conductor warned the plaintiff to "wait until the car stopped," to which warning she paid no heed, but alighted before the car had come to a stop, such verdict was against the clear weight of evidence.<sup>2</sup> Where a youth or a child is directed to jump off the car by the conductor, who refuses on request to stop;<sup>3</sup> or when frightened with a blow from the driver's whip,<sup>4</sup> his contributory

Weber v. Kansas City Cable R. Co., 100 Mo. 194, 12 S. W. 804, 18 Am. St. Rep. 541, 7 L. R. A. 819.

98. Blakney v. Seattle Elec. Co., 28 Wash. 607, 68 Pac. 1037. See also Spaulding v. Quincy & Boston St. Ry. Co., 184 Mass. 470, 2 St. Ry. Rep. 441, 69 N. E. 217; White v. West End St. R. Co., 165 Mass. 522, 43 N. E. 298; Knoxville Trac. Co. v. Carroll, 113 Tenn. 514, 3 St. Ry. Rep. 829, 82 S. W. 313.

99. Grabenstein v. Met. St. Ry. Co., 84 N. Y. Supp. 261; Lee v. Eliza-

beth, P. & C. J. Ry. Co., 1 St. Ry. Rep. 539, 69 N. J. L. 607, 55 Atl. 106.

1. Walker v. Georgia Ry. & E. Co., 122 Ga. 368, 3 St. Ry. Rep. 83, 50 S. E. 121.

2. Koues v. Met. St. Ry. Co., 1 St. Ry. Rep. 602, 86 App. Div. (N. Y.) 611, 83 N. Y. Supp. 380.

3. Wyatt v. Citizens' Ry. Co., 55 Mo. 485; Lovett v. Salem & S. D. R. Co., 9 Allen (Mass.) 557.

4. Mettlestadt v. Ninth Ave. R. Co., 4 Robt. (N. Y.) 377.

negligence is to be determined by the jury on properly considering the age, experience, and understanding of the person injured.<sup>5</sup>

**§ 364. Leaving conveyance — Taking position preparatory to. —**

A passenger on an electric car is not necessarily negligent in taking, with ordinary care, a position on the steps or platform of the car preparatory to alighting, or in attempting to alight while the car is moving so slowly that it would not appear to a man of ordinary prudence to be dangerous.<sup>6</sup> So it is not negligence *per*

**5.** *Washington, A. & M. V. El. R. Co. v. Quayle*, 95 Va. 741, 30 S. E. 391.

**6.** *Alabama.* — *Birmingham Ry. & El. Co. v. James*, 121 Ala. 120, 25 So. 847; *Watkins v. Birmingham Ry. & El. Co.*, 120 Ala. 147, 24 So. 392, 43 L. R. A. 297.

*California.* — *Griffin v. Pacific Elec. Ry. Co.*, 4 St. Ry. Rep. 80, 82 Pac. 1084.

*Illinois.* — *Alton Ry. & Gas Co. v. Webb*, 219 Ill. 563, 4 St. Ry. Rep. 202, 76 N. E. 687; *North Chicago St. R. Co. v. Wiswell*, 168 Ill. 613, 48 N. E. 407.

*Minnesota.* — *Saiko v. St. Paul City R. Co.*, 67 Minn. 8, 69 N. W. 473.

*Mississippi.* — *Bowie v. Greenville St. R. Co.*, 69 Miss. 196, 10 So. 574.

*Missouri.* — *Sweeney v. Kansas City Cable Co.*, 150 Mo. 385, 51 S. W. 682; *Schepers v. Union Depot R. Co.*, 126 Mo. 665, 5 Am. Elec. Cas. 399, 29 S. W. 712; *Pim v. St. Louis Transit Co.*, 108 Mo. App. 713, 3 St. Ry. Rep. 560, 84 S. W. 155; *Duncan v. Wyatt Park, etc., Co.*, 48 Mo. App. 659.

*New Jersey.* — *Scott v. Bergen Co. Trac. Co.*, 63 N. J. L. 407, 43 Atl. 1060, 4 Chic. L. J. Wkly. 379; *New Jersey Trac. Co. v. Gardner*, 60 N. J.

L. 571, 38 Atl. 669, 9 Am. & Eng. R. Cas. N. S. 643.

*Pennsylvania.* — *Jagger v. People's Pass. Ry. Co.*, 180 Pa. St. 436, 36 Atl. 867, 38 L. R. A. 786.

See note, 2 St. Ry. Rep. 995.

A street car passenger who leaves his seat when the car is approaching his destination and goes to the platform for the purpose of alighting when the car comes to a stop is not as a matter of law guilty of contributory negligence. *Ranous v. Seattle Electric Co.*, 47 Wash. 544, 6 St. Ry. Rep. 206, 92 Pac. 382, citing *Consolidated Traction Co. v. Thalheimer*, 59 N. J. L. 474, 37 Atl. 132; *Weir v. Seattle Electric Co.*, 41 Wash. 657, 4 St. Ry. Rep. 1070, 84 Pac. 597.

**The fact that the passenger attempted to step off** the car while it was in motion will not prevent her recovery for injuries occasioned by a sudden start of the car so nearly simultaneous with her stepping off that she had no chance after the car started but was obliged to step off to avoid falling. *Piper v. Minneapolis St. R. Co.*, 52 Minn. 269, 53 N. W. 1060; *Mitchell v. El. Trac. Co.*, 12 Pa. Super. Ct. 472. See also, as to rule stated in the text, *Birmingham Ry. & E. Co. v. Clay*, 108 Ala. 233, 19 So. 309; *Central R. & Bkg. Co. v.*

se to rise from a seat and step to the side of a slowly moving open car which is coming to a stop for the purpose of getting upon the running-board to alight when the car does stop.<sup>7</sup> So, it is not negligence *per se* for a passenger to go upon the front platform of a car for the purpose of being ready to alight when the car reaches the place where he wishes to get off, though there are unoccupied seats in the car.<sup>8</sup> And it is not contributory negli-

Miles, 88 Ala. 260, 6 So. 696; Carr v. Eel River, etc., R. Co., 98 Cal. 366, 33 Pac. 213; Baltimore, etc., R. Co. v. Kane, 69 Md. 11, 13 Atl. 387; New York, etc., R. Co. v. Coulbourn, 69 Md. 360, 16 Atl. 208; Fleck v. Union R. Co., 134 Mass. 480; Schaherl v. St Paul City R. Co., 42 Minn. 42, 43 N. W. 837; Eppendorf v. Brooklyn City & N. R. Co., 69 N. Y. 195, 25 Am. Rep. 171; Morrison v. Erie R. Co., 56 N. Y. 302; Nichols v. Sixth Ave. R. Co., 38 N. Y. 131, 97 Am. Dec. 780; Nance v. Carolina C. R. Co., 94 N. C. 619; Washington & G. R. Co. v. Harmon, 147 U. S. 571, 13 S. Ct. 557, 37 L. ed. 284; Doss v. M., K. & T. R. Co., 59 Mo. 27, 21 Am. Rep. 371; Babcock v. Los Angeles Trac. Co., 128 Cal. 173, 60 Pac. 780. there is no rule of law which requires a passenger in a street car to retain his seat or other position until the car has actually stopped, and it is a matter of universal observation, that thousands, every day, leave their seats to get off before the car has stopped, without sustaining and injury; Consol. Trac. Co. v. Thalheimer, 59 N. J. L. 474, 37 Atl. 132.

**But where a car is stopped at an unusual place** at the urgent request of a passenger who arose from his seat and was standing on the edge of an open car with his back to the front of the car, the motorman had a right to assume that the passenger

would not place himself in a position of danger, and his rising from his seat in violation of the printed rules and before the car had stopped was negligence. Jennings v. Union Trac. Co., 1 St. Ry. Rep. 743, 206 Pa. 31, 55 Atl. 765. See also Bainbridge v. Union Trac. Co., 1 St. Ry. Rep. 694, 206 Pa. St. 71, 55 Atl. 836; Gillespie v. Yonkers R. Co., 1 St. Ry. Rep. 644, 87 App. Div. (N. Y.) 38, 83 N. Y. Supp. 1043; Jones v. Canal & C. R. Co., 109 La. 213, 33 So. 200.

A passenger who, though acquainted with the line and with its dangers and in spite of a warning notice conspicuously placed in the car, steps upon the footboard of a moving trolley car for the purpose of alighting, his body being outside the car, and is struck by a trolley post, and is injured, is guilty of contributory negligence, which bars recovery against the railway company. Sharkey v. Lake Roland El. Ry. Co., 84 Md. 163, 34 Atl. 1130, 6 Am. Electrl. Cas. 412. See also Flynn v. Consol. Trac. Co., 67 N. J. L. 546, 52 Atl. 369.

**7.** Davis v. Camden, G. & W. Ry. Co., 73 N. J. L. 415, 4 St. Ry. Rep. 757, 63 Atl. 843.

**8.** Wellmeyer v. St. Louis Transit Co., 198 Mo. 527, 5 St. Ry. Rep. 628, 95 S. W. 925, so holding where a passenger went on the front platform when within about three hundred feet of his destination and was injured by

gence for a passenger, who has signaled the conductor to stop, to fail to take hold of the rail or bar while riding on the platform preparatory to alighting.<sup>9</sup> And where in such a case a passenger is thrown and injured by a sudden jerk of the car, a presumption is held to arise that the company was not using the requisite care and diligence for the safe carriage of passengers.<sup>10</sup> So, although a street railway company is not liable to a passenger who leaves his seat when the car is approaching his destination, in order to alight when the car stops, for injuries resulting from the ordinary jolting or jerking of the car or the acceleration of its speed for the purpose of reaching its usual stopping place, it is liable for injuries sustained by such a passenger where the speed was accelerated for the purpose of proceeding without stopping for the passenger to alight.<sup>11</sup> Where a passenger stands on the step of a car as it is about to stop and loses his balance and falls, and he alleges the sudden jerking of the car, and the evidence shows that such jerking was not greater than was usual in the stopping of street cars, and there was no discoverable defect in the step, he cannot recover

a sudden lurch of the car due to a defective condition of the track.

9. *Chicago Union Trac. Co. v. Hawthorn*, 211 Ill. 367, 3 St. Ry. Rep. 141, 71 N. E. 1022.

10. *Griffin v. Pacific Electric Ry. Co.*, 1 Cal. App. 678, 4 St. Ry. Rep. 80, 82 Pac. 1084.

In Pennsylvania it has been decided that a passenger riding on the back platform of a street car who goes onto the step while the car is in motion and is thrown off by a sudden jerk is guilty of such contributory negligence as will bar a recovery. *Gaffney v. Union Traction Co.*, 211 Pa. St. 91, 3 St. Ry. Rep. 770, 60 Atl. 488.

11. *Ranous v. Seattle Electric Co.*, 47 Wash. 544, 6 St. Ry. Rep. 206, 92 Pac. 382. In this case a passenger on a street car, having made known

to the conductor her desire to alight at a certain street, and the conductor having given the proper signal, as the car approached said street, arose from her seat and proceeded to the back platform of the car, with the intention of alighting when the same should come to a stop. As the car reached about the center of the street designated its speed was suddenly accelerated and the passenger was thrown into the street. The car did not stop at the designated street and the acceleration of the speed was not for the purpose of reaching the stopping place on the opposite side thereof. *Held*, that the defendant company was not relieved from liability on the ground that it owed no duty to passengers not to accelerate the speed in order to reach a stopping place.

for the injuries.<sup>12</sup> Where a passenger, in alighting from a car, after placing one foot safely on the platform, stepped with the other between the platform and the step, where there was a horizontal space of six inches, and fell, receiving an injury, his own freedom from negligence is not so clearly shown as to entitle him to claim that the injury was due to the faulty construction of the platform.<sup>13</sup> Where defendant's cars contained posted notices that the cars stopped near intersecting streets, and passengers must not leave their seats until the cars stopped, nor stand on the platform, nor leave the car while in motion, and the plaintiff went to the platform and got on the lower step to jump off, after asking the conductor to let him off at the next corner, and while standing there the conductor signaled to go ahead and he was thrown into the street, he was guilty of contributory negligence.<sup>14</sup> Where while the car was in motion a passenger stepped onto the running-board for the purpose of alighting, and, while attempting to pass to rear of car to get bundle he had left there, was struck on the head by a pole, the question of his negligence was held to be for the jury.<sup>15</sup>

§ 365. **Leaving conveyance — As to place.** — Where a passenger in alighting at an unusual and dangerous place does no more than an ordinarily prudent person would have done under the circumstances, he is not guilty of contributory negligence.<sup>16</sup> A passenger on a street car has the right to expect that the street where he alights is in a safe condition; and if he alight without looking to see where he is stepping and is injured thereby, he is not necessarily negligent.<sup>17</sup> A plea assuming that it was the duty of a passenger to inquire of a street railway company or its agent

12. *Phillips v. St. Charles St. Ry. Co.*, 106 La. 592, 31 So. 135.

13. *Gabriel v. Long Island R. Co.*, 54 App. Div. (N. Y.) 41, 66 N. Y. Supp. 301.

14. *Baltimore Consol. Ry. Co. v. Foreman*, 94 Md. 226, 51 Atl. 83.

15. *Mason v. Boston & U. St. Ry.*

*Co.*, 190 Mass. 255, 4 St. Ry. Rep. 475, 76 N. E. 717.

16. *Mobile Light & R. Co. v. Walsh*, 146 Ala. 295, 4 St. Ry. Rep. 23, 40 So. 560.

17. *Bass v. Concord St. Ry.*, 70 N. H. 170, 46 Atl. 1056.

as to whether the place of stopping is a reasonably safe place for him to alight is properly overruled.<sup>18</sup> Where a passenger stepped on a running-board to alight, and without looking at the ground where she was about to step, put her foot down and let go of the handle of the car before her feet touched the ground and fell into a gutter by the side of the road, she was held to be guilty of contributory negligence precluding a recovery.<sup>19</sup> And where a passenger on a street car, who, as he testified, was sick, but whom the carrier's servants supposed to be under the influence of liquor, was helped from the car at the terminus of the route and by the conductor of the car was led to the front of the station at or near to the public street and left at a place where his way was open in the direction in which he wished to go; the conductor then leaving on his outward trip, and he turned and went toward the back of the station, and twenty minutes later slipped down between the front and rear wheels of a car moving on a track that lay between where he was then standing and the place where he was left, it was held that the railway company was not liable for damages for the resulting injury.<sup>20</sup>

**§ 366. Leaving conveyance — Crossing parallel track.** — As a general rule, a passenger, on alighting from a car and attempting to cross a track parallel with the one on which the car from which he alighted is running, is bound before crossing the track to look carefully for the approach of a car upon such parallel track, and his omission to take any precaution is not justified by the failure of the motorman on the approaching car to ring the bell or give any signal of his approach.<sup>21</sup> So where a passenger in

**18.** *Montgomery St. Ry. Co. v. Mason*, 133 Ala. 508, 32 So. 261.

**19.** *Quinlan v. Newton & B. St. Ry.*, 191 Mass. 58, 4 St. Ry. Rep. 478, 77 N. E. 486. See *Mahoney v. Philadelphia Rapid Transit Co.*, 214 Pa. St. 180, 4 St. Ry. Rep. 967, 63 Atl. 429.

**20.** *Bageard v. Consolidated Trac. Co.*, 64 N. J. L. 316, 45 Atl. 620.

**21.** *Indianapolis St. Ry. Co. v. Tenner*, 32 Ind. App. 311, 1 St. Ry. Rep. 178, 67 N. E. 1044; *Hornstein v. United Rys. Co.*, 195 Mo. 440, 4 St. Ry. Rep. 659, 92 S. W. 884; *Johnson v. Third Ave. R. Co.*, 69 App. Div. (N. Y.) 247, 74 N. Y. Supp. 599. See also *Gray v. Ft. Pitt Trac. Co.*, 198 Pa. St. 184, 47 Atl. 945. See note, 1 St. Ry. Rep. 178.

alighting from a car started to cross a parallel track without stopping or looking or listening for an approaching car, and the evidence tended to show that he was reading a paper as he walked across such track, and that he could have seen the car three blocks distant if he had looked, it was held that he was guilty of contributory negligence precluding a recovery.<sup>22</sup> And where it appeared that a passenger, while the car was in motion, alighted on a parallel track in front of and within four or five feet of a rapidly moving car which was going in the opposite direction, it was held on appeal from a judgment for defendant that the plaintiff was guilty of negligence which precluded recovery. And it was held that though the car which struck the plaintiff was going at an unusual rate of speed, yet from the evidence in the case, this was not the proximate cause of the accident.<sup>23</sup> Again,

In a case in Kentucky it is said: "When a car has been stopped at the usual place for discharging passengers, it is the duty of those in charge of an approaching car on the other track to have it under such control that it may be stopped at a moment's notice, so that persons who have alighted may cross the track safely." *Louisville City Ry. Co. v. Hudgins*, 30 Ky. L. Rep. 316, 98 S. W. 275.

And in another case where a passenger in transferring from one car to another had to cross a track, it was declared that his duty to look and listen for an approaching car on that track should be measured by his opportunity to see and hear the car and that his environment should also be considered, and that if after considering these it appears that he used such care as a reasonably prudent man would have used in the same or similar circumstances he should not, as a matter of law, be convicted of contributory negligence because he failed to discover a car in time to get out of its way.

*Waechter v. St. Louis & M. R. Co.*, 113 Mo. App. 270, 5 St. Ry. Rep. 646, 88 S. W. 147.

**22.** *Deane v. St. Louis Transit Co.*, 192 Mo. 575, 4 St. Ry. Rep. 655, 91 S. W. 505.

**23.** *Foreman v. Norfolk, P. & M. News Co.*, 106 Va. 770, 6 St. Ry. Rep. 800, 56 S. E. 805. The court said: "We are of opinion that the contributory negligence of the plaintiff in this case was the proximate cause of his injury, and such as to bar all right of recovery on his part. He stepped from a car moving, according to his own testimony, at the rate of five miles an hour. He could have alighted on one side, perhaps, with safety, but he selected the side where the space between two parallel tracks for him to occupy was not more than thirty-two inches, because his home was on that side, and he would be thereby saved a few additional feet of walk. He alighted on the parallel track in front of the rapidly moving car of the defendant company, when it was within four or five feet of him,

where a person who had alighted from a car and in attempting to cross a parallel track was struck by a car going in the opposite direction, it was declared that though such car may have been running at an excessive speed and such speed was persuasive of negligence on the part of the defendant, it did not relieve the plaintiff of the charge of contributory negligence for not looking or for not waiting until an obstruction to his vision by the car from which he had alighted was removed. "The speed of the car in no way prevented him from seeing its approach, and the faster it was going the less excuse he had for advancing in a direction across its track. If it were going so fast that the motorman obviously did not intend to respect his right, he would have been guilty of negligence in attempting to cross."<sup>24</sup> Where a person's vision is obstructed the duty is all the more imperative to avail himself of every possible unobscured opportunity, and, if partial obstruction to vision or hearing exists, to make effort to overcome such obstruction.<sup>25</sup> Upon the question of what is due care on the part of a passenger alighting from a car and proceeding to cross a parallel track upon which cars are running in an opposite direction, the doctrine has been applied that such care can only be satisfied by full use of the senses of sight and hearing at the last moment of opportunity before passing the line between safety

without seeing it, when the most ordinary and casual glance would have disclosed his peril in doing so.

"We do not mean to say that the act of alighting from a moving street car, taken by itself, or a failure to look for approaching street cars, taken by itself, would be *per se* negligence. But these acts, considered, as they should be, in connection with all the circumstances of the case, make a combination of negligence which precludes a recovery, and shows that the plaintiff alone is responsible for the injuries of which he complains. *Weber v. Kansas City Cable Co.*, 100 Mo. 194, 12 S. W. 804,

13 S. W. 587, 7 L. R. A. 819, 18 Am. St. Rep. 541; *Creamer v. West End St. Ry. Co.*, 4 Am. Electrl. Cas. 476, 156 Mass. 320, 31 N. E. 391, 16 L. R. A. 490, 32 Am. St. Rep. 456; *Gonzales v. N. Y. & H. Ry. Co.*, 38 N. Y. 440, 98 Am. Dec. 58."

**24.** *Shuler v. North Jersey St. Ry. Co.*, 75 N. J. L. 824, 6 St. Ry. Rep. 811, 69 Atl. 181, citing *Earle v. Consolidated Traction Co.*, 64 N. J. L. 573, 46 Atl. 613.

**25.** *Morice v. Milwaukee Elec. Ry. & L. Co.*, 129 Wis. 529, 6 St. Ry. Rep. 810, 109 N. W. 567, quoting from *Koester v. Chicago & N. W. R. Co.*, 106 Wis. 464, 82 N. W. 295. See

and peril.<sup>26</sup> Where, however, the passenger alights and passes around the rear of the car, understanding that the rule of the company requires that a moving car on the parallel track should slacken its speed on approaching a car stopping to allow passengers to alight, he may recover for an injury occasioned to him by the failure of the approaching car to observe the rule.<sup>27</sup> But in a case in Alabama where a person after alighting passed around in the rear of the car and was struck by a car coming in the opposite direction on a parallel track, it was held that he was not absolved from the duty of looking to see that such track was clear from the fact that a rule had been adopted by the company providing: "When a car is stopped on a double track or a siding to let passengers on or off, cars approaching in the opposite direction must

*Shuler v. North Jersey St. Ry. Co.*, 75 N. J. L. 824, 6 St. Ry. Rep. 811, 69 Atl. 181.

**26.** *Morice v. Milwaukee Elec. Ry. & L. Co.*, 129 Wis. 529, 6 St. Ry. Rep. 810, 109 N. W. 567, citing *Goldmann v. Milwaukee E. R. & L. Co.*, 3 St. Ry. Rep. 955, 123 Wis. 170, 101 N. W. 384; *Marshall v. Green Bay & W. R. Co.*, 125 Wis. 96, 103 N. W. 249; *White v. Chicago & N. W. R. Co.*, 102 Wis. 489, 78 N. W. 585; *Guhl v. Whitcomb et al.*, 109 Wis. 69, 85 N. W. 142, 83 Am. St. Rep. 889; *Schroeder v. Wisconsin C. R. Co.*, 117 Wis. 33, 93 N. W. 837.

"The duty of a person crossing the roadbed of a public highway used by such vehicles has been declared in this court to require him to use his powers of observation to observe approaching vehicles, and to exercise a reasonable judgment when and how to cross without collision. It has been here asserted that, when obstacles temporarily intervene to prevent observation, reasonable prudence would require delay until the re-

quired observation can be made." *Eagen v. Jersey City, H. & P. St. Ry. Co.*, 74 N. J. L. 699, 6 St. Ry. Rep. 812, 67 Atl. 24, citing *Newark Pass. Ry. v. Block*, 4 Am. Electl. Cas. 523, 55 N. J. L. 605, 27 Atl. 1067; *Connolly v. Trenton Pass. Ry.*, 5 Am. Electl. Cas. 510, 56 N. J. L. 701, 29 Atl. 438, 44 Am. St. Rep. 424; *C. R. Co. v. Smalley*, 61 N. J. L. 277, 39 Atl. 695; *Brown v. Elizabeth, Plainfield & C. R. Co.*, 1 St. Ry. Rep. 522, 68 N. J. L. 618, 54 Atl. 824."

**27.** *Dobert v. Troy City Ry. Co.*, 91 Hun (N. Y.) 28, 71 St. Rep. (N. Y.) 392, 36 N. Y. Supp. 105, distinguishing *Burke v. N. Y. C., etc., Co.*, 73 Hun (N. Y.) 35; *Tucker v. Same*, 124 N. Y. 308. See *Fielders v. North Jersey St. Ry. Co.*, 67 N. J. 76, 50 Atl. 533, where the passenger passed behind the car by the conductor's direction, and was injured by a defect in the payment, which the company was required to keep in repair, the question of its negligence was held to be for the jury.

stop.”<sup>28</sup> A person who on alighting from a car looks and sees no car approaching for a sufficient distance to warrant an ordinarily cautious person in believing that it is safe to attempt the crossing of a parallel track, has the right to proceed relying upon the assumption that the company will respect his equal rights of passage, and in the absence of any additional facts calling for the exercise of greater vigilance, cannot be said to be negligent, as a matter of law, if he does not thereafter look in the direction from which the danger happens to come.<sup>29</sup> A passenger leaving a street car and required to cross parallel tracks is not necessarily negligent in failing to observe the approach of another car, as the stopping of the car and the invitation to alight upon that side given by the company’s employees may be regarded as an assurance of the absence of danger.<sup>30</sup> Where a person, after alighting from a street car at night and while proceeding across the company’s track to her destination, looking for cars on such track to make certain that she would not cross the track in front of an approaching car, falls into a hole on the crosswalk between the tracks, she is not negligent, as she had a right to assume the crossing was safe, and it was her duty to look before crossing the track for approaching cars.<sup>31</sup> But in another case where a woman having alighted from a street car on a dark night, started to cross a parallel track when she knew that the ties and rails projected

**28.** *Birmingham Ry., L. & P. Co. v. Oldham*, 141 Ala. 195, 3 St. Ry. Rep. 19, 37 So. 452.

**29.** *Beers v. Metropolitan St. Ry. Co.*, 104 App. Div. (N. Y.) 96, 4 St. Ry. Rep. 854, 93 N. Y. Supp. 278.

**30.** *Schneider v. Market St. Ry. Co.*, 134 Cal. 482, 66 Pac. 734; *Cotton v. Lynn & B. R. Co.*, 180 Mass. 145, 61 N. E. 818; *Wise v. Brooklyn H. R. Co.*, 46 App. Div. (N. Y.) 246, 61 N. Y. Supp. 530; *Roberts v. New York, N. H. & H. R. Co.*, 175 Mass. 296, 56 N. E. 559; *Gray v. Fort Pitt Trac. Co.*, 198 Pa. St. 184, 47 Atl. 945; *Houston & T. C. R. Co. v. Dot-*

*son*, 15 Tex. Civ. App. 73, 58 S. W. 642; *Landrigan v. Brooklyn Heights R. Co.*, 23 App. Div. (N. Y.) 43, 48 N. Y. Supp. 454; *Toledo Consol. St. R. Co. v. Lutterbeck*, 11 Ohio C. C. 279; *Doyle v. Albany Ry.*, 5 App. Div. (N. Y.) 601, 39 N. Y. Supp. 440.

**31.** *Mahnke v. New Orleans City & L. R. Co.*, 104 La. 411, 29 So. 52. It is not contributory negligence as a matter of law for a passenger to wear a dress so long as to more than likely catch on any appliance extending above the platform. *Smith v. Kingston City R. Co.*, 55 App. Div. (N. Y.) 143, 67 N. Y. Supp. 185.

above the surface of the ground, and she might have avoided such obstruction by walking a short distance, it was held that she was guilty of contributory negligence precluding recovery for an injury sustained by her tripping on a rail and falling.<sup>32</sup>

§ 367. **Sudden peril — Acts in emergencies.** — There is no rule of law which imposes it as a duty upon one, over whom danger impends by the negligence of another, to incur greater danger by delaying his efforts to avoid it until its exact nature and measure are ascertained. The instinctive effort of a passenger, or his impulsive or unguarded act, resulting in injury, while trying to avoid danger, in a reasonable and well-grounded fear that a collision was about to take place or an accident occur, which would result in serious injury, due to the mismanagement of the carrier, does not relieve the carrier from responsibility; but is to be deemed a consequence of such management for which the carrier is responsible, and a presumption of negligence on the part of the carrier arises because of the injuries received.<sup>33</sup> But there must be a reasonable

**32.** *Kolberg v. Seattle Electric Co.*, 37 Wash. 612, 3 St. Ry. Rep. 885, 79 Pac. 1101.

**33.** *Illinois*. — *Chicago, etc., R. Co. v. Clough*, 134 Ill. 586, 25 N. E. 664.

*Indiana*. — *Pennsylvania R. Co. v. Stegemeier*, 118 Ind. 305, 20 N. E. 843.

*Kentucky*. — *South Covington, etc., Ry. Co. v. Ware*, 84 Ky. 267, 1 S. W. 493.

*Louisiana*. — *Holzab v. New Orleans, etc., R. Co.*, 38 La. Ann. 185.

*Massachusetts*. — *Gannon v. New York, etc., R. Co.*, 173 Mass. 50, 52 N. E. 1075, 43 L. R. A. 833, 5 Am. Neg. Rep. 613; *Floutrup v. Boston & M. R. Co.*, 163 Mass. 152, 39 N. E. 797.

*Michigan*. — *Howell v. Lansing City Elec. Ry. Co.*, 136 Mich. 432, 3 St. Ry. Rep. 443, 99 N. W. 406.

*Missouri*. — *Adams v. Hannibal, etc., R. Co.*, 71 Mo. 553.

*New York*. — *Twombly v. Central Park, etc., R. Co.*, 69 N. Y. 158, 25 Am. Rep. 162; *Coulter v. American M. U. Exp. Co.*, 56 N. Y. 585; *Stern v. Westchester Elec. R. Co.*, 99 App. Div. 491, 90 N. Y. Supp. 870; *Derff v. Brooklyn Heights R. Co.*, 95 App. Div. 82, 3 St. Ry. Rep. 714, 88 N. Y. Supp. 463; *Heath v. Glens Falls St. Ry. Co.*, 90 Hun 560, 71 St. Rep. 29, 36 N. Y. Supp. 22.

*Pennsylvania*. — *Palmer v. Warren St. Ry. Co.*, 206 Pa. St. 574, 56 Atl. 49.

*Texas*. — *Dallas Consol. Trac. Ry. Co. v. Randolph*, 8 Tex. Civ. App. 213, 27 S. W. 925, 5 Am. Electl. Cas. 379.

*Wisconsin*. — *Knowlton v. Milwaukee City Ry. Co.*, 59 Wis. 278; *Din-*

apprehension of danger and the carrier is not liable for an injury to a passenger occasioned by her jumping from the car under a reasonable apprehension of danger where there was no real danger and the apparent danger was caused, not by the negligence of the carrier, but of the gateman, not a servant of a carrier, at a railway crossing, and his confusion and contradictory warnings and signals, no negligence on the part of the driver of the street car being shown.<sup>34</sup> Where an explosion occurs and a passenger, under apprehension of danger, jumps from a car, he must have acted under reasonable apprehension. His conduct must have conformed to that of an ordinarily careful and prudent man under like circumstances, and if he acts unreasonably, or rashly, or becomes frightened at a trivial occurrence not calculated to alarm a reasonably prudent man and thereby brings injury on himself, the company is not liable.<sup>35</sup> The general rule is that a person placed by the reckless or careless acts of the servants or agents of another, in such a position as to be compelled to choose upon the instant and in the face of a great and impending peril between two hazards, a dangerous leap from the moving car, or to remain in the car at an apparently certain peril, is not precluded from recovery against the carrier for injuries thereby sustained, because of the fact that the car passed in safety and the peril was averted, where the action of the passenger was such as would have been taken by any one of ordinary prudence, placed in the same situation, and was not the result of unreasonable alarm, and the injury was the result of such enforced action, and the proximate cause of the injury the misconduct of the persons in charge of the car. The peril of remaining in the car is to be judged by the circumstances as they then appeared to the passenger, and not by the result, and the passenger has the right to act upon the probabilities as they appeared at the time. It is for the jury to say

ney v. Wheeling & E. G. R. Co., 28 Wis. 32.

34. Kleiber v. People's R. Co., 107 Mo. 240, 17 S. W. 946, 14 L. R. A. 613. And see Getman v. Delaware, L.

& W. R. Co., 162 N. Y. 21, 56 N. E. 553.

35. Chretien v. New Orleans Rys. Co., 113 La. 761, 3 St. Ry. Rep. 293, 37 So. 716.

whether any one of ordinary prudence placed in the same situation would have acted in the same manner, and the outcries of the passengers in the same peril are competent upon the question as to whether the alarm of the person injured was unreasonable.<sup>36</sup>

Whether a passenger is guilty of contributory negligence in jumping from a car under an apprehension of danger is a question of fact for the jury to determine from the negligence of the company, the nature of the accident, the age and experience of the person jumping, and all the surrounding circumstances, including the time, the place, and the conduct of others.<sup>37</sup> So it is not error to instruct the jury in an action to recover for an injury caused by a panic among the passengers as the result of an explosion that "if a person, without fault on her part, is confronted with sudden danger, or apparent sudden danger, the obligation resting upon her to exercise ordinary care for her own safety, does not require her to act with the same deliberation and foresight which might be required under ordinary circumstances."<sup>38</sup> In the use of electrical appliances, the carrier is bound to use the very highest degree of care to see that those in use on the car do not get out of order and so endanger the safety of passengers.<sup>39</sup>

**36.** *Twomley v. Central Park, etc., R. Co.*, 69 N. Y. 158, 25 Am. Rep. 162; *Dyer v. Erie Ry. Co.*, 71 N. Y. 236; *Cuyler v. Decker*, 20 Hun (N. Y.) 175; *Odom v. St. Louis S. W. R. Co.*, 45 La. Ann. 1201, 14 So. 734, 23 L. R. A. 152; *Carruth v. Texas & P. R. Co.*, 45 La. Ann. 1228, 14 So. 736; *West Chicago St. R. Co. v. Lyons*, 57 Ill. App. 536; *Lacas v. Detroit City Ry. Co.*, 92 Mich. 412, 52 N. W. 745. When the motorman was in no danger, but upon an explosion abandoned his post and jumped over the front seat among the passengers, one of whom was thus frightened and injured, the whole question is for the jury. *Dunlay v. Traction Co.*, 18 Pa. Super. Ct. 206. Where a passenger was injured while attempting to leave

a moving street car which apparently was about to collide with a locomotive coming at a high rate of speed, the fact that the danger was only apparent did not make her action in leaving the car amount to contributory negligence, and she was under no duty to notify the driver that she wished to alight. *Selma Street & Suburban Ry. Co. v. Owen*, 132 Ala. 420, 31 So. 598.

**37.** *Mannon v. Camden Interstate Ry. Co.*, 56 W. Va. 554, 3 St. Ry. Rep. 928, 49 S. E. 450.

**38.** *Chicago Union Traction Co. v. Newmiller*, 215 Ill. 383, 4 St. Ry. Rep. 165, 74 N. E. 410.

**39.** *Leonard v. Brooklyn Heights R. Co.*, 7 Am. Electl. Cas. 683, 57 App. Div. (N. Y.) 125, 67 N. Y.

§ 368. Sudden peril — Acts in emergencies — Application of rules. — Where, by reason of the electric current being suddenly reversed to prevent a collision, the circuit breaker blew out, causing a loud explosion and a flash of light in the car, which was followed by the crash of breaking glass from the collision, the fact that the plaintiff, a nervous woman, was injured by jumping from the car, while the other passengers remained in the car and were uninjured, did not preclude her from the right to recover for her injuries.<sup>40</sup> So, a passenger, attempting to board a street car which starts after she has her foot upon the step and her hand upon the railing, is not necessarily negligent in continuing her hold upon the car after it starts, since, being placed in sudden peril by the negligence of the carrier, she is not held to strict

Supp. 985, an action for injuries received by a woman in jumping from an electric car, where it appeared by the evidence that the entire car was enveloped in flames caused by defective insulation of the cables underneath. It was also held that the question whether the accident was caused by defective insulation, and whether the company used due care in its inspection was for the jury. *Poulson v. Nassau Elec. R. Co.*, 7 Am. Electl. Cas. 675, 18 App. Div. (N. Y.) 221, 45 N. Y. Supp. 941, where plaintiff's ten-year-old daughter jumped from an electric car because of a blaze of fire coming from alongside of the motorman, which blaze was so great that it was noticed fifty or sixty feet away, it was sufficient to authorize the jury to infer negligence on the part of the company. *Poulson v. Nassau Elec. R. Co.*, 7 Am. Electl. Cas. 677, 30 App. Div. (N. Y.) 246, 51 N. Y. Supp. 933, and the fact that other passengers remained in the car would not operate conclusively to establish con-

tributory negligence on plaintiff's part in jumping. *Buckbee v. Third Ave. R. Co.*, 7 Am. Electl. Cas. 692, 64 App. Div. (N. Y.) 360, 72 N. Y. Supp. 217, where plaintiff, a woman, in escaping a car stepped on the door-sill and claimed to have received an electric shock, flames having broken from the controller-box and extended beneath the car for its entire length, being preceded by a loud report, the evidence was held sufficient to go to the jury on the question as to whether plaintiff's injury arose from a shock of electricity.

40. *Wanzer v. Cheppewa Valley El. R. Co.*, 108 Wis. 310, 84 N. W. 423. And see *Texarkana St. R. Co. v. Hart*, (Tex. Civ. App.) 26 S. W. 435. So, a passenger on a stalled electric car is not negligent, as a matter of law, in attempting to jump from a car on suddenly noticing that there is danger of another car colliding with it. *Quinn v. Shamokin & M. C. Elec. R. Co.*, 7 Pa. Super. Ct. 19; *Shankenbury v. Met. St. R. Co.*, (C. C., W. D. Mo.) 46 Fed. 177.

accountability for her mode of action.<sup>41</sup> Where it appeared that deceased jumped in fright from a car upon appearance of flashes accompanied by smoke and a hissing noise, evidence that the conductor jumped from the car before deceased was held competent to show negligence in operating the car with an incompetent conductor in charge of it.<sup>42</sup> Where a youth of twelve years, being frightened by an explosion on the car and subsequent flames coming from the controller box, left his seat, jumped from the car and was thus injured, the question of his freedom from contributory negligence was held to be one for the jury, whose finding in that respect should be conclusive.<sup>43</sup> Where a passenger jumped from a street car to escape a threatened collision with a train, it was declared that if the negligence of the defendants created a reasonable apprehension of death or serious bodily injury upon the part of appellee, and that such apprehension caused her to jump from the car and she was thereby injured, she could recover the damages arising therefrom.<sup>44</sup> Where, in an action by a passenger of a street car for injuries resulting in jumping from it to escape a threatened collision with a train, at a railroad crossing, the evidence tended to show that had the railroad company kept a proper lookout the street car would have been seen and the train would not have rapidly approached the crossing in the manner in which

**41.** *Joliet St. Ry. Co. v. Duggan*, 45 Ill. App. 450. And see *Washington & G. R. Co. v. Hickey*, (D. C. App.) 23 Wash. L. Rep. 177.

**42.** *Blumenthal v. Union Electric Co.*, 129 Iowa 322, 4 St. Ry. Rep. 303, 105 N. W. 588. The court said: "Electricity is a dangerous agent, and its use must be attended with the highest degree of care and skill. But, notwithstanding this, there may be an appearance of great danger when there is no danger at all. It may be negligence therefore to place in charge of a car a person whose experience and competency are so limited that he does not know whether

the danger is real or only apparent."

**43.** *Paine v. Geneva, W. S. F. & C. L. Trac. Co.*, 115 App. Div. (N. Y.) 729, 6 St. Ry. Rep. 812, 102 N. Y. Supp. 204. The court said: "The fact that the plaintiff jumped from the car while the other passengers remained seated, and that if he had remained he would not have been injured, does not establish negligence on his part as matter of law. *Poulsen v. Nassau Electric R. Co.*, 7 Am. Electl. Cas. 677, 30 App. Div. 246."

**44.** *Galveston, H. & S. A. Ry. Co. v. Vollrath*, 40 Tex. Civ. App. 46, 4 St. Ry. Rep. 1022, 89 S. W. 279.

it did, and that if it had given a proper signal of its approach, as required by statute, the street car would not have gone upon the crossing, and where the evidence also tended to show that if the street car had stopped, as required by city ordinance, before attempting to cross the railroad, the approach of the train would not have alarmed plaintiff, and the accident would not have occurred, it was held that the acts of negligence of the two companies concurred in producing the result and that each was liable therefor.<sup>45</sup> Where a passenger, a girl under fourteen years of age, unaccustomed to riding upon street cars, becomes frightened and frenzied by the negligence of the defendant's servants in carrying such passenger past her destination, and the conductor knows, or by the exercise of due care and diligence under the circumstances should know, of such passenger's frightened and frenzied condition, and that she is about to leave the moving car, it is his duty to exercise the highest degree of care possible under the circumstances to prevent such passenger from alighting from the moving car. In such case, if the conductor fails to exercise the degree of care required of him, and the passenger in consequence of such failure receives injuries while alighting from the moving car, the street railway company is liable in damages for the resulting injuries.<sup>46</sup>

**45.** Galveston, H. & S. A. Ry. Co. v. Vollrath, 40 Tex. Civ. App. 46, 4 St. Ry. Rep. 1022, 89 S. W. 279.

**46.** Kruger v. Omaha & C. B. St. Ry. Co., 80 Neb. 490, 6 St. Ry. Rep. 311, 114 N. W. 571. The court said: "The defendant contends that it was under no obligation to prevent plaintiff from leaving the moving car, that it owed no duty of preventing passengers from alighting from its moving cars, and that, as a matter of law, it was not liable for the injuries received by the plaintiff, and that the court should have so instructed the jury. We are cited to several cases from other jurisdictions, some of which apparently hold to this doc-

trine. But the rule in this State is different. C., B. & Q. R. Co. v. Landauer, 36 Neb. 643, 54 N. W. 976; St. Joseph & G. I. R. Co. v. Hedge, 44 Neb. 448, 62 N. W. 887; Chicago, B. & Q. R. Co. v. Hyatt, 48 Neb. 167, 67 N. W. 8; Fremont, E. & M. V. R. Co. v. French, 48 Neb. 641, 67 N. W. 472. It is generally held that whether or not one is guilty of such negligence in alighting from a moving car or train as will prevent a recovery for injuries received therefrom is ordinarily a question of fact to be determined by the jury. Hemmingway v. Chicago, M. & St. P. R. Co., 72 Wis. 42, 37 N. W. 804, 7 Am. St. Rep. 823. Under some circumstances,

jumping or alighting from a moving train has been held such negligence as will defeat a recovery. *C., B. & Q. R. Co. v. Martelle*, 65 Neb. 540, 91 N. W. 364. In that case, however, the plaintiff was a man of mature years, and deliberately jumped from the moving train. It did not appear that he was frightened, or that he had lost his self-control, but that he deliberated upon the matter, and after deliberation voluntarily jumped from the moving train. It was held that he was guilty of such negligence and deliberate recklessness as to prevent a recovery. But the case at bar is different. The plaintiff was little accustomed to riding upon street cars, and according to her contention, which finds support in the evidence, she was carried past her destination by the fault of the defendant. It was after dark, and she was frightened and excited, and had no realization of what she was doing, or of the danger incident to the alighting from the moving car. It is inferable from the evidence that the conductor was aware of her excited and frenzied condition, and might, by the exercise of that degree of care required of common carriers, have prevented her from leaving the moving car and thus have avoided the injuries. We think there is a clear distinction between the duty owed by a

common carrier to an infant of tender years and that owed to an adult, and between the duty owed to a passenger who has lost control of his mental faculties, of which the carrier is aware, and that owed to one in full possession of his faculties. When street car companies carry passengers of tender years and passengers whom they know to be of unsound mind, it is only proper that they should be required to exercise a higher degree of care toward them than they would toward passengers of mature years and in possession of their full faculties; and if, by acts of their own negligence, they have caused passengers to become frightened and excited and to be in a measure deprived of their faculties, they cannot consistently and reasonably claim that the passenger is negligent in not exercising the prudence and foresight that they ordinarily would, except for their frenzied and excited condition. We think the record in this case clearly makes out such a state of facts as required the submission of the case to the jury; and this court cannot say, as a matter of law, that the defendant was not negligent, or that such negligence did not produce the injuries complained of. The case was one for the determination of the jury under proper instructions." *Per GOOD, C.*

## CHAPTER XVII.

### As to Persons Other Than Passengers and Employees.

- SECTION 369. Care required in operation of road.  
370. Measure of care due to young and infirm persons.  
371. Duty to trespassers.  
372. Construction and repair of roadbed, tracks and appliances.  
373. Same subject — Duty and liability generally continued.  
374. As to switches.  
375. Condition of cars and appliances.  
376. Negligence in providing fenders and other guards.  
377. Injuries from the use of electricity and electric wires.  
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381. Duties of motormen, gripmen and other employees.  
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or rules.  
383. Statutes, municipal ordinances and other regulations generally.  
384. Statutes and municipal ordinances as to speed.  
385. Who liable for injuries.  
386. Joint and several liability.  
387. Street cars have paramount right of way.  
388. Right of way at street crossings.  
389. Right of way over tracks elsewhere than at street crossings.  
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391. Obstructions in streets.  
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393. Rate of speed.  
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patrol wagons.  
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399. Collisions with other cars or trains.  
400. Collisions with vehicles.  
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SECTION 404. Injuries to persons on or near tracks.

405. Injuries to persons on or near tracks — When liable.

406. Injuries to persons on or near tracks — When not liable.

407. Collisions with workmen on the street.

408. Injuries to children generally.

409. Injuries to children — Negligence of company — When liable.

410. Injuries to children — When company not chargeable with negligence.

411. Obstructing street car line by moving of house.

§ 369. Care required in operation of road. — The courts have not generally held street railways to the exercise of such a high degree of care in the operation of their roads to prevent injuries to other travelers, as is required of them in the case of passengers, owing to the special relation existing between carrier and passenger arising out of contract, express or implied, but have laid down the rule that they are bound to exercise due or ordinary care and prudence and such reasonable diligence and caution as all the surrounding circumstances of the case require.<sup>1</sup> A

1. *United States*. — *Potts v. Chicago City Ry. Co.*, 33 Fed. 610.

*Arkansas*. — *Citizens' St. Ry. Co. v. Steen*, 42 Ark. 321.

*California*. — *Henderson v. Los Angeles Traction Co.*, 150 Cal. 689, 5 St. Ry. Rep. 51, 89 Pac. 976; *Roller v. Sutter St. R. Co.*, 66 Cal. 230, 5 Pac. 108.

*Delaware*. — *Wilman v. People's Ry. Co.*, 4 Penn (Del.) 260, 55 Atl. 332.

*Kentucky*. — *Gorman's Adm'r v. Louisville Ry. Co.*, 24 Ky. L. Rep. 1938, 72 S. W. 760.

*Missouri*. — *Koenig v. Union Depot Ry. Co.*, 173 Mo. 698, 73 S. W. 637; *Aldrich v. St. Louis Trans. Co.*, 101 Mo. App. 77, 74 S. W. 141; *Boland v. Missouri R. Co.*, 36 Mo. 484.

*New York*. — *Geipel v. Steinway R. Co.*, 14 App. Div. (N. Y.) 551, 43 N. Y. Supp. 934; *Weiler v. Manhattan R. Co.*, 53 Hun (N. Y.) 372, 6 N.

Y. Supp. 320; *Unger v. Forty-Second St. & G. S. F. R. Co.*, 51 N. Y. 497, 6 Robt. 237; *Etherington v. Prospect Park & Coney Island R. Co.*, 88 N. Y. 641, 642; *Folatio v. Broadway & Seventh Ave. R. Co.*, 9 Daly (N. Y.) 243.

*Ohio*. — *Pendleton St. R. Co. v. Shires*, 18 Ohio St. 255; *Pendleton St. R. Co. v. Stallman*, 22 Ohio St. 1.

*Rhode Island*. — *Goldrick v. Union R. Co.*, 37 Atl. 635, 20 R. I. 128, 2 Am. Neg. Rep. 647.

*Texas*. — *Ft. Worth St. R. Co. v. Witten*, 74 Tex. 202, 11 S. W. 1001.

*Utah*. — *Hall v. Ogden City St. R. Co.*, 13 Utah 243, 44 Pac. 1046, 4 Am. & Eng. R. Cas. N. S. 77.

This general doctrine is sustained and asserted in decisions cited throughout this chapter.

A street railway company in the running of its cars is required to exercise ordinary care and prudence to avoid injuring a person rightfully

street railway company in operating its road, running its cars, and selecting its appliances and employees, is not required to exercise the best method human skill and ingenuity have devised to prevent accidents, but the care and prudence employed should be reasonably commensurate with the danger to be encountered.<sup>2</sup> The part of the street on which a street railway is laid, and over which cars are operated, is not withdrawn from public use and travel. The rights and duties of the public and the street car operatives are mutual and reciprocal. The only right that the operators of a street railway possesses over the public generally is a preferential right of passage over the tracks with the cars, and that between public crossings it is always the duty of the pedestrian or the person driving a vehicle to see to it that he does not impede the street car. But the street car company, in operating its cars, must likewise at all times and places exercise ordinary care so as not to injure any one who may be on or near the track, and at public crossings must have its cars under the control of the operator, and must exercise reasonable care to have them so in approaching the crossings; the degree of care to be exercised always depending upon the prevailing circumstances and conditions. As a general rule, therefore, where a collision occurs between a person lawfully using the street and a street car, the question as to whether the operator or such person, or both, were

using the streets, regardless of statutory regulation on the subject. *Swanson v. Chicago City Ry. Co.*, 242 Ill. 388, 6 St. Ry. Rep. 451, 90 N. E. 210, citing *Chicago City Ry. Co. v. Fenimore*, 199 Ill. 9, 64 N. E. 985; *Chicago & Joliet Elec. Ry. Co. v. Wanic*, 230 Ill. 530, 82 N. E. 821, 15 L. R. A. N. S. 1167.

It is a general rule that where a person lawfully using the street is struck by a street car, the question as to whether the operator or such person, or both, were exercising the degree of care that the law imposes is a question of fact. *Spiking v. Con-*

*solidated Ry. & P. Co.*, 33 Utah 313, 6 St. Ry. Rep. 320, 93 Pac. 838.

2. *California*. — *Mock v. Los Angeles Traction Co.*, 139 Cal. 616, 73 Pac. 455.

*Colorado*. — *Zimmerman v. Denver Consol. Tramway Co.*, 18 Colo. App. 480, 72 Pac. 607.

*New York*. — *Stierle v. Union Ry. Co.*, 156 N. Y. 685, 50 N. E. 834; *Koehne v. New York & Q. C. Ry. Co.*, 165 N. Y. 603, 58 N. E. 1089.

*Ohio*. — *McKeown v. Cincinnati St. R. Co.*, (Cin. Super. Ct.) 2 Ohio Leg. N. 388.

*Tennessee*. — *Memphis St. Ry. Co.*

exercising the degree of care that the law imposes is a question of fact depending upon all the surrounding circumstances and conditions.<sup>3</sup> The principles of law governing the management of trains propelled by steam power and those regulating cars operated by electricity are not identical.<sup>4</sup> It is the duty of street railroads to keep their cars and roadway in good condition, to provide competent and careful servants, to see that they use reasonable care to avoid danger, operate the cars at reasonable rates of speed, and slow up or stop, if need be, when danger is imminent.<sup>5</sup> There appears, however, to be nothing in the handling of an electric street car which demands that a person, otherwise competent, should have more instruction and experience than may be acquired during four months' service as conductor and one month's service as motorman.<sup>6</sup> Such companies are required to adopt the best precautions against danger in general use and which experience

v. Kartright, 110 Tenn. 277, 75 S. W. 719.

3. Spiking v. Consolidated Ry. & P. Co., 33 Utah 313, 6 St. Ry. Rep. 320, 93 Pac. 838.

4. Wolf v. City Ry. Co., 50 Oreg. 64, 6 St. Ry. Rep. 265, 91 Pac. 460. See Indianapolis St. Ry. Co. v. Taylor, 39 Ind. App. 592, 5 St. Ry. Rep. 270, 80 N. E. 436.

5. Maxwell v. Wilmington City Ry. Co., 1 Marv. (Del. Super. Ct.) 199, 40 Atl. 945.

**Inexperienced motorman being instructed.** — Where it was alleged that the motorman in charge of the car at the time of the collision was inexperienced and incompetent and it appeared that he was a new employee just learning the business and was accompanied by a competent and experienced motorman to teach him how to operate the car, it was said that while it is true that the motorman in charge of the motor on the car in this instance was inexperi-

enced, that fact of itself does not constitute negligence on the part of the street car company. It is necessary that men learn the business. The operation of motor cars is not a natural gift, and we can conceive of no other way in which the business can be learned than the one that was employed in this case by the company. They had taken the precaution to provide a skilled and experienced motorman to accompany the novice, to teach him the art, and presumably to see that no harm came from his inexperience, and this man was present with him at the time the accident occurred, and it is not manifest from the evidence that, if the experienced motorman had hold of the motor at the time, the accident would not have happened just as it did. Columbus St. Ry. & L. Co. v. Reap, 40 Ind. App. 689, 6 St. Ry. Rep. 771, 82 N. E. 977.

6. Cloud v. Alexandria Elec. Rys. Co., 121 La. 1061, 6 St. Ry. Rep. 303, 46 So. 1017.

has shown to be superior and effectual, and to avail themselves of every known safeguard or generally approved invention to lessen danger, but they are not negligent in failing to adopt something that public use has indicated as proper, or which their own common sense, if applied, would teach them was proper and reasonably necessary to prevent injuries, or to adopt some proposed invention to prevent injury to persons on their tracks, which is then existing only in the experimental stage.<sup>7</sup> A street railway company which adopts or uses in the operation of its cars a propelling power, such as electricity, which increases the hazards of persons in the rightful use of the street, is bound to exercise a degree of care proportioned to the increase of danger arising from the use of such power.<sup>8</sup> It is the duty of the gripman and those in charge of the operation of a cable car in crowded city streets to be on the lookout, to employ all reasonable means to avoid accidents, and to respect the equal rights of others to the use of the public streets.<sup>9</sup> It is negligence to run an electric car at an unusual speed without giving warning of its approach to a street crossing.<sup>10</sup> It is the duty of street railway companies running over tracks in respect to which the right of common user exists in the public, to exercise such watchful care as will prevent accidents or injuries to persons who, without negligence on their part, may not at the moment be able to get out of the way of a passing car.<sup>11</sup> Street

**7.** *Buente v. Pittsburgh, A. & M. Traction Co.*, 2 Pa. Super. Ct. 185.

**8.** *Larson v. Central R. Co.*, 56 Ill. App. 263; *Godfrey v. Streator R. Co.*, 56 Ill. App. 378; *Dougherty v. Mo. Ry. Co.*, 97 Mo. 647, 8 S. W. 900, 15 West. Rep. 235; *Hall v. Ogden City St. R. Co.*, 13 Utah 243, 44 Pac. 1046, 4 Am. & Eng. R. Cas. N. S. 77; *Thompson v. Salt Lake R. T. Co.*, 16 Utah 281, 52 Pac. 92, 10 Am. & Eng. R. Cas. N. S. 563, 40 L. R. A. 172.

**9.** *Illinois*. — *West Chicago St. R. Co. v. Williams*, 87 Ill. App. 548.

*Maryland*. — *Baltimore Trac. Co.*

*v. Wallace*, 77 Md. 435, 21 Wash. L. Rep. 313, 26 Atl. 518.

*Missouri*. — *Winters v. Kansas City Cable R. Co.*, 99 Mo. 509, 40 Am. & Eng. R. Cas. 261, 12 S. W. 652.

*Pennsylvania*. — *Ackerman v. Union Traction Co.*, 205 Pa. St. 477, 55 Atl. 16.

*Virginia*. — *Danville Ry. & Elec. Co. v. Hodnett*, 101 Va. 361, 43 S. E. 606.

**10.** *Owensboro City R. Co. v. Hill*, 21 Ky. L. Rep. 1638, 56 S. W. 21.

**11.** *Gilmore v. Federal St. & P. V. Pass. R. Co.*, 153 Pa. St. 31, 25

cars propelled by electricity, and running along land burdened only with the easement of a public highway, cannot be run at a rate of speed incompatible with the lawful and customary use of the highway by others with reasonable safety.<sup>12</sup> A street railway company operating cars with horses is not, however, held to any greater degree of care as to pedestrians or other vehicles in the street than the driver of any other vehicle; if its horse be attached to the cars by the method in general use, and which has been found usually adequate and safe, its duty in this respect is discharged.<sup>13</sup> Where an electric street railway company is constructing its line across the tracks of a steam railroad, its wires should be strung at such a height as not to interfere with the proper operation of the latter road.<sup>14</sup>

§ 370. Measure of care due to young and infirm persons. — Practically the same measure of care on the part of street railroad companies is required to be exercised to prevent injuries to aged and infirm persons on or near their tracks as is required for the protection of children under like circumstances.<sup>15</sup> The rule is only modified by the fact that the employees of the company are usually unable to so readily discover the incapacity or disability of adult persons.<sup>16</sup> In the case of children the servants of the company are charged with notice of their incapacity, but, as to adults, they

Atl. 651; *Kestner v. Pittsburgh & B. Tract. Co.*, 158 Pa. St. 422, 27 Atl. 1048; *Dallas Rap. T. R. Co. v. Dunlap*, 7 Tex. Civ. App. 877, 26 S. W. 877; *Jones v. Greensburgh, J. & P. St. R. Co.*, 9 Pa. Super. Ct. 65, 43 W. N. C. 298.

12. *Newark Pass. R. Co. v. Bloch*, (N. J. Err. & App.) 22 L. R. A. 374, 55 N. J. L. (26 Vroom) 605, 56 Am. & Eng. R. Cas. 590, 27 Atl. 1067.

13. *Unger v. Forty-second St. & G. S. F. R. Co.*, 51 N. Y. 497, 6 Robt. 237.

14. *Saginaw Union St. Ry. Co. v.*

*Michigan Central R. Co.*, 91 Mich. 657, 4 Am. Electl. Cas. 243, 52 N. W. 49, holding that where the wires are not so placed the steam railroad company may raise or remove them but must do this with a due regard to the business of the street railway company and so as to do as little harm as possible.

15. See cases cited generally under sections 408-411, *post*, as to injuries to children.

16. See cases cited generally under sections 408-411, *post*, as to contributory negligence of aged and infirm persons.

have a right to assume them to be possessed of the usual faculties, and that they will take reasonable care to protect themselves, and the company cannot be held responsible for their infirmities.<sup>17</sup> When, however, they have knowledge, or it is apparent, that the person upon or near the track and apparently about to go upon or across the track or in dangerous proximity to it is a person aged or infirm or suffering from some physical disability, the driver, motorman, or gripman of a street car is bound to greater caution in approaching and passing him.<sup>18</sup> The motorman of a trolley car is not, as matter of law, free from negligence in failing to stop a car on perceiving a person walking upon or close to the track and apparently heedless of signals.<sup>19</sup> But, on the other hand, a traveler upon the street must reasonably exercise all his faculties to learn of an approaching car and to keep out of its way, so that, with the entire street open to her, a woman, knowing that she cannot hear a car's approach and that a car is coming behind her, who walks on the street railroad track, is held to be guilty of such negligence that she cannot recover damages for an injury occasioned in being run down.<sup>20</sup> And where, in such case, the motorman did not know that plaintiff was deaf, and did not hear the ringing of the bell, and there was nothing in the situation, appearance, or conduct of plaintiff to indicate to a reasonably careful and prudent motorman that plaintiff would not heed the warning in time to avoid injury, it being a common practice for persons so situated to wait until the last moment before getting out of the way, and the motorman did not discover plaintiff's danger until the car was only six or eight feet away, when, being unable to stop in that distance, he redoubled his efforts to warn plaintiff by vigorously clanging the bell, the motorman could

**17.** *Schulte v. New Orleans City & L. R. Co.*, 44 La. Ann. 509, 10 So. 811; *Cowan v. Third Ave. R. Co.*, 9 N. Y. Supp. 610, 31 St. Rep. (N. Y.) 145.

**18.** See cases cited generally under sections 408-411, *post*, as to injuries to children and as to contribu-

tory negligence of aged and infirm persons.

**19.** *Butelli v. Jersey City, H. & R. Elec. R. Co.*, 59 L. J. L. (30 Vroom) 302, 36 Atl. 700, 2 Chic. L. J. Wkly. 202.

**20.** *Gilmartin v. Lackawanna Val. R. T. Co.*, 186 Pa. St. 193, 40 Atl. 322.

not be said to have failed to exercised due care either in failing to sooner discover plaintiff's peril or in the efforts made to avoid the injury, after he realized it.<sup>21</sup>

§ 371. **Duty to trespassers.** — Where the right of way is enclosed by fences, a motorman is under no obligation to keep a lookout for trespassers. His legal duty is to sound his gong or blow his whistle when he sees trespassers on the track and to take all precautions possible to stop his car when he discovers that they are not aware of his approach.<sup>22</sup> A street railway company owes no duty of foresight to a trespasser on its tracks, but only reasonable care to avoid injury after the danger is discovered. Thus, in an action to recover for the death of a person caused by being struck by a street car while crawling over a long trestle on a dark night, it was held that the company was not liable, it appearing that in shutting off the current to reduce the speed in going on the trestle the headlight of the car was extinguished, and when it was again turned on the deceased was for the first time discovered by the motorman so close in front of his car that he was unable to stop it before striking her.<sup>23</sup> As to trespassers, it is said that it

**21.** *Bennett v. Metropolitan St. Ry. Co.*, 122 Mo. App. 703, 6 St. Ry. Rep. 33, 99 S. W. 480.

**22.** *Wade v. Detroit Y. A. A. & J. Ry. Co.*, 151 Mich. 684, 115 N. W. 713.

See *Johnson v. Birmingham Ry. L. & P. Co.*, 149 Ala. 529, 5 St. Ry. Rep. 17, 43 So. 33.

Who are trespassers on track. See note 6 St. Ry. Rep. 235.

A street railway company owes no duty to a trespasser to keep a lookout for him. This principle applies with equal force to adults and infants, except in cases where infants are enticed upon the track. *Birmingham Ry., L. & P. Co. v. Jones*, 153 Ala. 157, 6 St. Ry. Rep. 235, 45 So. 177.

**Who are trespassers.** — While

a person may, for the purpose of merely crossing a railroad, do so without becoming a trespasser, yet if he lingers on it, or walks along it at a place where he is not entitled to walk, he is a trespasser, and the company owes him no duty to keep a lookout for him. *Birmingham Ry., L. & P. Co. v. Jones*, 153 Ala. 157, 6 St. Ry. Rep. 235, 45 So. 177.

A person does not become a trespasser by driving upon a street car track where the track is straight and the view unobstructed for at least three hundred feet. *McKenzie v. United Rys. Co.*, 216 Mo. 1, 115 S. W. 13.

**23.** *Richmond Pass. & P. Co. v. Rocks*, 101 Va. 487, 1 St. Ry. Rep. 796, 44 S. E. 709.

will not do to lay down as an invariable rule applicable to all cases that a railroad company owes no duty to trespassers. Conduct which might, under one set of circumstances, show that all ordinary and reasonable care and diligence had been observed, might, under a different set of circumstances, be insufficient to show an observance of such care and diligence. Such rule could mean no more than this: Taking the locality where the car is running, and all the attendant circumstances, if those in control of the movement of the car have no reason to apprehend that there may likely be a human being on the track in front of it, they are under no duty to one who in fact may be there, until they have actually discovered that he is there. But if, from the locality or attending circumstances known to the company, there is reason to apprehend that the track in front of the car may not be clear of human beings, then it would seem it is the duty of the employees of the company to keep a lookout ahead of the car. This, it seems to us, is a safe and conservative judicial principle — one which will conserve human life and at the same time place no burden on the company.<sup>24</sup> So in the case of a motorman running a car over a track laid on the company's private right of way, it does not seem that he is bound to keep a lookout ahead for trespassers on the track when he has a right to assume that the track is clear, though such a duty is imposed where it appears that such track has been in continual use by pedestrians.<sup>25</sup>

**§ 372. Construction and repair of roadbed, tracks, and appliances.** — It is a common-law duty and usually a statutory duty that street railways shall so construct, repair, and maintain their roadbed, tracks, and appliances that the usefulness of the highway by the general public shall be impaired in the smallest possible degree, and that the public who travel on foot or in vehicles may be enabled to use the highway with reasonable safety. The obligation of the company is twofold: first, properly to construct the

**24.** Birmingham Ry., L. & P. Co. v. Jones, 153 Ala. 157, 6 St. Ry. Rep. 235, 45 So. 177.

**25.** Levelsmeier v. St. Louis & S. Ry. Co., 114 Mo. App. 412, 5 St. Ry. Rep. 601, 90 S. W. 104.

roadbed, track, and appliances, and, second, after having so constructed them, to maintain them in a safe condition, and it becomes liable for all injuries resulting as a proximate consequence of a failure on its part to comply with this duty.<sup>26</sup> It is the common-law duty of a street railway company to keep the space occupied by its roadbed properly graded and in good repair, so as not to be an obstruction to travel. It must be built substantially with the level of the street so as to permit vehicles to cross without

**26. Alabama.** — Birmingham Union R. Co. v. Alexander, 93 Ala. 133, 9 So. 525; Elyton Land Co. v. Mingea, 89 Ala. 521, 7 So. 666.

**Arkansas.** — Pugh v. Texarkana L. & T. Co., 86 Ark. 36, 109 S. W. 1019.

**Connecticut.** — Jacques v. Bridgeport H. R. Co., 41 Conn. 61.

**Illinois.** — Chicago Union Tract. Co. v. Fitzgerald, 138 Ill. App. 520.

**Indiana.** — Citizens' St. R. Co. v. Twiname, 111 Ind. 587, 30 Am. & Eng. R. Cas. 16, 13 N. E. 55; Delzell v. Indianapolis, etc., R. Co., 32 Ind. 45.

**Iowa.** — Bergert v. Davenport St. Ry. Co., 34 Iowa 571.

**Louisiana.** — Cline v. Crescent City R. Co., 43 La. Ann. 327, 9 So. 122, 26 Am. St. Rep. 187; Nivette v. New Orleans & L. S. R. Co., 42 La. Ann. 1153, 8 So. 581.

**Maine.** — Bangs v. Lewiston & R. Horse R. Co., 89 Me. 194, 6 Atl. 73.

**Massachusetts.** — Woodman v. Met. Ry. Co., 149 Mass. 335, 21 N. E. 482, 4 L. R. A. 213; McKenna v. Met. Ry. Co., 112 Mass. 55, the company cannot escape by showing the neglect of duty by another company.

**Missouri.** — Griveand v. St. Louis Cable, etc., R. Co., 33 Mo. App. 453, where wheels of a buggy dropped into slot of a cable road. Keitel v.

St. Louis Cable R. Co., 28 Mo. App. 657.

**New York.** — Allen v. Buffalo, R. & P. Ry. Co., 151 N. Y. 434, 45 N. E. 845; Worster v. Forty-second St., etc., R. Co., 50 N. Y. 203; Wiley v. Smith *et al.*, 25 App. Div. 351, 49 N. Y. Supp. 934; Casper v. Dry Dock, E. B. & B. R. Co., 23 App. Div. 451, 48 N. Y. Supp. 352; Schild v. Central Park, N. E. R. Co., 133 N. Y. 446, 16 N. Y. Supp. 701; Carpenter v. Central Park, etc., R. Co., 4 Daly 555, 11 Abb. Pr. 416; Fash v. Third Ave. R. Co., 1 Daly 148; Rockwell v. Third Ave. R. Co., 64 Barb. 448; Conroy v. Twenty-third St. R. Co., 52 How. Pr. 50; Eagen v. Forty-second St., etc., R. Co., 19 St. Rep. 676, where the evidence failed to show that the injury resulted from any neglect of duty on the part of the company there can be no recovery.

**Pennsylvania.** — Wagner v. Pittsburgh W. E. Pass. R. Co., 158 Pa. St. 419, 27 Atl. 1008; Bradwell v. Pittsburgh W. E. Pass. R. Co., 153 Pa. St. 105, 25 Atl. 623, wherein street railway companies have been held liable for injuries resulting from rails projecting above the surface of the street.

**Texas.** — United Elec. R. Co. v. Shelton, 89 Tex. 423, 46 Am. & Eng.

difficulty.<sup>27</sup> The company is, therefore, bound to keep its roadway and tracks upon the same grade with the rest of the street, and to raise or lower them as subsequent changes in the street necessitate a change, in compliance with statutory or municipal requirements.<sup>28</sup> The rails of a street car track should be laid

R. Cas. 206, killing of horse by improperly hung electric wire. See *Shelton v. Northern Texas Tract. Co.*, 1 St. Ry. Rep. 788, 75 S. W. 338, where the negligence of defendant was held to be a concurring proximate cause of the accident.

*Wisconsin.* — *Fitts v. Cream City R. Co.*, 59 Wis. 323, 18 N. W. 186.

*England.* — *Oliver v. N. E. Ry. Co.*, L. R. 1 Q. B. 409; *Rex v. Kerri-son*, 3 Maule & S. 526.

Liability for defective construction and maintenance of tracks. See note 6 St. Ry. Rep. 1, 1 St. Ry. Rep. 788.

As to notice of defects in tracks, see note 6 St. Ry. Rep. 1.

A railway company is under obligation to properly lay its rails and to so maintain them that the passage over them at crossings shall be safe and convenient for travelers, even if it becomes necessary to elevate or depress the rails from time to time in order to insure such a situation. *Bangs v. Lewiston & Horse R. Co.*, 89 Me. 194, 36 Atl. 73.

Liability for injuries to pedestrians from defective rails. See note 6 St. Ry. Rep. 7.

**27.** *Pugh v. Texarkana L. & T. Co.*, 86 Ark. 36, 109 S. W. 1019.

**28.** *Galveston City R. Co. v. Nolan*, 53 Tex. 139, 3 Am. & Eng. R. Cas. 387; *Houston City St. R. Co. v. De Lesdernier*, 84 Tex. 82, 19 S. W. 366, where rail projected above street level; *Schild v. Central Park, N. & E. R. Co.*, 133 N. Y. 446, 31

N. E. 327, 16 N. Y. Supp. 701, where rail projected three inches above a crosswalk; *Wasmer v. Delaware, etc., R. Co.*, 80 N. Y. 212; *Wooley v. Grand St., etc., R. Co.*, 83 N. Y. 121, where a switch was put down higher than was reasonable and necessary, or was suffered by the railroad to be an obstruction to the public, the company was held liable; *Ashland St. R. Co. v. Ashland*, 78 Wis. 271, 47 N. W. 619; *Little Rock v. Citizens' St. R. Co.*, (Ark.) 50 Am. & Eng. R. Cas. 456; *Smith v. Union Ry. Co.*, 61 Mo. 588; *Halifax St. Ry. Co. v. Joyce*, 17 Can. Sup. Ct. 709; *Attorney-General v. Toronto St. Ry. Co.*, 14 Grant's Ch. 673; *Eddy v. Ottawa City Pass. Ry. Co.*, 31 Up. Can. Q. B. 569; *Miller v. Lebanon & A. St. R. Co.*, 186 Pa. St. 190, 42 W. N. C. 274, 40 Atl. 413, it is not negligent for a street railroad company to lay its track in a trench below the existing grade pursuant to the direction of the township supervisors made in view of a contemplated lowering of the grade. *Gray v. Washington Water Power Co.*, 30 Wash. 665, 71 Pac. 206; *Memphis, P. P. & B. R. Co. v. State*, 87 Tenn. 746, 11 S. W. 946.

The power conferred upon public authorities to change the grade of a highway for the purposes of its use as such carries with it the power to authorize a street railroad to change the grade of the highway for its use for railway purposes. *Austin*

and maintained on a level with the grade of the street, so as not to constitute a substantial interference with the passage of vehicles. If the rails are permitted to project above the surface of the street or to become dangerous in other respects, the road becomes a nuisance, which may be abated, and for which the company is answerable in damages.<sup>29</sup> The rails and ties must be of such kind and so laid that the public will not be prevented from making use of that part of the street for their vehicles, and when ordinance or statute prescribes the manner of their construction, the company must comply with their requirements.<sup>30</sup> A street railway company is required independently of any ordinance to use reasonable care to keep the flanges of its rails reasonably safe for vehicles to pass over.<sup>31</sup> Under statutes requiring street railway companies to keep in permanent repair that portion of the street between its tracks and two feet outside thereof, a street railway company owes the public the duty to keep such portion of the pavement in repair, so that a person injured by its failure to do so may maintain a suit for damages against the company.<sup>32</sup> It is not negligence for a street

v. Detroit, Y. & A. A. Ry. Co., 1 St. Ry. Rep. 385, 134 Mich. 149, 96 N. W. 35.

**29.** San Antonio Rap. Tr. St. Ry. Co. v. Limburger, 88 Tex. 79, 30 S. W. 533.

**30.** Spokane St. R. Co. v. Spokane Falls, 46 Fed. 322; Fitts v. Cream City R. Co., 59 Wis. 323, 15 Am. & Eng. R. Cas. 462, 18 N. W. 186, where turntable used by company was defective; Snell v. Rochester R. Co., 19 N. Y. Supp. 496; Commonwealth v. Central Pass. Ry. Co., 52 Pa. St. 519; Easton, S. E. & W. E. Pass. R. Co. v. City of Easton, 133 Pa. St. 505, 43 Am. & Eng. R. Cas. 253, 19 Am. St. Rep. 658, 19 Atl. 486. In New York center-bearing rails in municipal streets are prohibited by statute, chapter 676, Laws of 1892; Brown v. Met. St. Ry. Co., 60 App.

Div. (N. Y.) 184, 70 N. Y. Supp. 40; affd., 171 N. Y. 699, 64 N. E. 1119, a street railway was held liable for injury to a bicyclist on evidence that the slot of its cable line was for a few feet wider than elsewhere.

Liability for injuries caused by wheels of vehicles striking rails protruding above surface of street. See note 6 St. Ry. Rep. 4.

**31.** Chicago Union Tract. Co. v. Fitzgerald, 138 Ill. App. 520.

**32.** Lavigne v. City of New Haven, 1 St. Ry. Rep. 47, 75 Conn. 693, 55 Atl. 569; McLaughlin v. Phila. Tract. Co., 175 Pa. St. 565, 34 Atl. 863; Doyle v. City of New York *et al.*, 58 App. Div. (N. Y.) 588, 69 N. Y. Supp. 120; Conway v. City of Rochester, 157 N. Y. 33, 51 N. E. 395; Sanford v. Union Pass. Ry. Co., 16 Pa.

railway company, in the ordinary course of operating its railway and repairing and laying its track, to excavate and throw up earth into the street, if it does not allow it to remain there for an unreasonable time, or without lights or barriers.<sup>33</sup> A street railway company which has placed rails upon the street, temporarily, for its use in reconstructing or repairing its tracks, is bound to exercise reasonable care to guard the public using the street against the danger of accident to any one in the use of the street.<sup>34</sup> Where plaintiff was injured while crossing the tracks of the defendant at a place where repairs were being made, by a steel rail, handled by the defendant's employees, rolling upon and crushing her foot, and it appeared that a short time prior to the accident she had crossed the track at the same place and had noticed that some of the planks and rails were taken up, but on her return she observed nothing to indicate danger, and was not warned until the very instant the injury occurred; the plaintiff's testimony was that there were no barriers placed where the repairs were being made, and the defendant's testimony was to the opposite effect, and also that its employees did not observe the plaintiff until too late to prevent the injury; it was held that the evidence did not justify the claim that the jury was warranted in finding that the defend-

Super. Ct. 393, the liability of the railway company to persons injured by defects is no higher nor greater than that which the law imposes on the municipality itself; *Lowery v. Brooklyn City R. Co.*, 76 N. Y. 28; *Cline v. Crescent City R. Co.*, 43 La. Ann. 327, 9 So. 122; *Call v. Portsmouth, K. & Y. St. Ry.*, 69 N. H. 562, 45 Atl. 405; *Paine v. Railway Co.*, 58 N. H. 611; *Osgood v. Railway Co.*, 130 Mass. 492, at common law a defendant street railroad company would be liable to any one who, in the exercise of due care, was injured by an obstruction or defect in a highway caused by the negligence of such company. *Alton, etc., Ry. Co.*

*v. Dietz*, 50 Ill. 210, 99 Am. Dec. 509.

**33.** *Cowan v. Muskegon R. Co.*, 84 Mich. 583, 48 N. W. 166; *Zanger v. Detroit City R. Co.*, 87 Mich. 646, 49 N. W. 879; *Donovan v. Oakland & B. Rapid Transit Co.*, 102 Cal. 245, 36 Pac. 516, it is liable for an injury caused by falling into a post-hole completed two or three days before the accident.

**34.** *Thomas v. Consol. Tract. Co.*, 62 N. J. L. 36, 42 Atl. 1061, 6 Am. Neg. Rep. 122; *Lane v. City of Syracuse*, 12 App. Div. (N. Y.) 118, 42 N. Y. Supp. 219, so of a barrier placed in the street to guard an excavation.

ant's employees were guilty of such negligence as to make the defendant responsible, notwithstanding the plaintiff's own negligence.<sup>35</sup>

**§ 373. Same subject — Duty and liability generally continued.**

— The company is not, however, liable for defects or imperfections which may be caused by traffic, such, for instance, as rails becoming loose or spikes projecting, except upon proof that it failed to repair such defects or imperfections after reasonable opportunity for ascertainment thereof had elapsed. The rules governing its duty toward those using the streets and the evidence necessary to sustain the charge of negligence are not the same as are applicable to it as a common carrier of passengers in relation to its duty to its passengers.<sup>36</sup> A street railway company is liable for a defect immediately connected with its track and plainly visible to its employees in operating the road, and notice to it is not necessary, as, for instance, where a horse was injured by stepping into a hole which had been between the tracks for several days in plain sight.<sup>37</sup> If, in crossing a street railway track, a cutter is overturned because of the negligent failure of the com-

**35.** *Sosnofski v. Lake Shore & M. S. Ry. Co.*, 1 St. Ry. Rep. 375, 134 Mich. 72, 95 N. W. 1077, holding also that if the plaintiff saw that repairs were being made at the point where she crossed the track, she was bound to observe whether the repairs interfered with the passage of persons at that point; and that if she saw workmen moving a rail along the walk, and rolling it into place in the track of the defendant, it was her duty to avoid a danger that would have been apparent to a person of ordinary caution and prudence; and that, if barriers were placed as claimed by defendant, and the plaintiff stepped over the same in defiance thereof, and proceeded to cross where

the workmen were at work, and was injured, she could not recover.

**36.** *Kelly v. Met. St. Ry. Co.*, 25 Misc. Rep. (N. Y.) 194, 54 N. Y. Supp. 173; *Casper v. Dry Dock, E. B. & B. R. Co.*, 23 App. Div. (N. Y.) 451, 48 N. Y. Supp. (82 St. Rep.) 352, on appeal from retrial, 56 App. Div. (N. Y.) 372, 67 N. Y. Supp. 805; *Schnell v. Met. St. Ry. Co.*, 50 App. Div. (N. Y.) 616, 64 N. Y. Supp. 67; *Higgins v. Brooklyn, Q. C. & S. R. Co.*, 54 App. Div. (N. Y.) 69, 66 N. Y. Supp. 334. And see *Houston City St. Ry. Co. v. Medlenka*, 17 Tex. Civ. App. 621, 43 S. W. 1028.

**37.** *Worster v. Forty-second St., etc., R. Co.* 50 N. Y. 203.

pany to keep in repair a line of planking which had originally been placed at the side of the rails for the purpose of bridging up to them, and the occupants of such cutter are injured, the railway is liable.<sup>38</sup> In an action against a street railway company for injuries caused by tripping over a rail it appeared from the evidence that the rails of the car track extended about one foot above the surface of the street on the outside of the rail and from three to four inches between them, and that while the plaintiff was rushing across the track to escape a runaway team her foot slipped under the rail and in consequence thereof she was thrown down and seriously injured. It was held that the evidence made out a *prima facie* case for the plaintiff, and that she was entitled to have the jury pass upon it under proper instructions.<sup>39</sup> A street railway company is not relieved from liability for damages for injuries occasioned by a wagon striking a loose rail, by reason of the permission of the city to operate the road.<sup>40</sup> A street railway company, having purchased the property of another company, is bound to keep the tracks in a safe condition so as to prevent injuries to persons driving vehicles over the same, and if it permits the rails to protrude above the surface of the street so as to be dangerous it is liable for injuries resulting therefrom.<sup>41</sup> A street railway company is not relieved from liability for an injury caused by depressions in the tracks rendering them dangerous to cross, by the fact that such depressions have been caused by the gradual wearing away of the road by travel or natural sinking of the street from the rails.<sup>42</sup> A street railroad company must have notice of any such depression in its roadway or tracks, or the conditions must be such that it ought to have discovered them.<sup>43</sup> A street railroad

**38.** *Bolster v. Ithica St. Ry. Co.*, 79 App. Div. (N. Y.) 239, 79 N. Y. Supp. 597; *affd.*, 178 N. Y. 554, 70 N. E. 1096.

**39.** *Huff v. St. Joseph Ry., L., H. & P. Co.*, 213 Mo. 495, 111 S. W. 1145.

**40.** *Dominguez v. Railroad Co.*, 35 La. Ann. 751.

**41.** *Citizens' Ry. & Light Co. v. Johns*, 116 S. W. 62.

**42.** *Houston City St. R. Co. v. Medlenka*, 17 Tex. Civ. App. 621, 43 S. W. 1028; *Groves v. Louisville Ry. Co.*, 22 Ky. L. Rep. 599, 58 S. W. 508; *Paducah E. R. Co. v. Commonwealth*, 80 Ky. 149.

**43.** *Kelly v. Met. St. Ry. Co.*, 25

company was held not liable for injuries sustained by a plaintiff by stepping into a hole in the street while walking toward a car, when all that was shown as to the cause of the defect was that the company had been engaged in changing its motive power and contracts had been let for different portions of the work, but there was no evidence as to the extent of the excavations required to complete the work or whether the hole in question was within the line of such excavation.<sup>44</sup> Where the plaintiff was injured while crossing a street upon a crosswalk which had been taken up by the defendant street railroad company and defectively relaid, and it appeared that in relaying the crosswalk the defendant had reset the bricks, and that in so doing they were loosely laid, and the plaintiff in crossing at the place did not look down and notice the condition of the walk; the crossing was lighted at the place where the plaintiff was injured by a street lamp and by lights in a store building at not a great distance therefrom; a red light was placed on top of a barrel between the rails of the track at about a foot north on the edge of the crosswalk; and there was nothing to prevent the plaintiff from seeing the red light which she knew indicated danger, but she proceeded over the crosswalk without giving heed to the surrounding conditions, and without looking to see where she was walking; it was held that the plaintiff had a right to presume that the defendant had properly reconstructed the crossing, and that it was safe for travelers to pass over, and in the exercise of due care, she had the right to act on that presumption; that where there is evidence authorizing the finding by the jury that the plaintiff exercised such care as a reasonably prudent person would exercise under like circumstances, it will not be disturbed.<sup>45</sup> A street railway company which deposits ice and snow removed

Misc. Rep. (N. Y.) 194, 54 N. Y. Supp. 173; *Simon v. Met. St. Ry. Co.*, 29 Misc. Rep. (N. Y.) 126, 60 N. Y. Supp. 251, the defense that defendant was not using the tracks at the time of the injury was not available. *Maloney v. Natick & C. St. R. Co.*, 173 Mass. 587, 54 N. E.

349; *Gumpper v. Waterbury Tract. Co.*, 68 Conn. 424, 36 Atl. 806.

44. *Moss v. Crimmins et al.*, 57 App. Div. (N. Y.) 587, 68 N. Y. Supp. 495.

45. *Union Tract. Co. v. Barnett*, 1 St. Ry. Rep. 121, (Ind.) 67 N. E. 205, also held that, it being

from its tracks at the side of the track in masses so as to constitute an obstruction to the free and safe use of the street and allows it to remain there for an unreasonable length of time, is liable for injuries sustained by the overturning of a vehicle because of such masses of snow, or the falling of a pedestrian in crossing its tracks, notwithstanding it is primarily the duty of the city to prevent or remove such obstructions.<sup>46</sup> But it is not chargeable with negligence in heaping up snow along the sides of its track after a heavy snowstorm rendering it liable to one so injured, in the absence of evidence that such heaping up was unnecessary, or that the work could have been done in some other manner, or that the heaps were not removed within a reasonable time.<sup>47</sup> No duty, in the absence of statute or municipal ordinance, rests upon a street railway company to keep the space between its tracks free from ice and

the duty of the street railway company to reconstruct the crosswalk after it had been torn up for the construction of its tracks, and to restore the street as nearly as practicable to its former condition, it was bound to know whether this had been done or not, and it was, therefore, harmless to admit evidence that the defendant was notified of the condition of the crossing.

See note, 1 St. Ry. Rep. 121.

**46.** *United States.* — McDonald v. Toledo Consol. St. R. Co., 43 U. S. App. 79, 20 C. C. A. 322, 74 Fed. 104, 36 Ohio L. J. 49, 29 Chic. Leg. N. 35.

*Massachusetts.* — Mahoney v. Met. R. Co., 104 Mass. 73.

*Michigan.* — Laughlin v. St. Railway of Grand Rapids, 62 Mich. 220, 28 N. W. 873; Bowen v. Detroit City R. Co., 54 Mich. 496, 20 N. W. 559, 52 Am. Rep. 822, 19 Am. & Eng. R. Cas. 131; Wallace v. Detroit City R. Co., 58 Mich. 231, 24 N. W. 870.

*New York.* — Markowitz v. Dry Dock, E. B. & B. R. Co., 12 Misc.

Rep. 412, 67 St. Rep. 572, 33 N. Y. Supp. 702; Somerville v. City R. Co. of Poughkeepsie, 17 N. Y. Supp. 719, 43 St. Rep. 425; Friedman v. Dry Dock, etc., R. Co., 11 N. Y. Supp. 429, 33 St. Rep. 649; Wooley v. Grand St., etc., R. Co., 83 N. Y. 121, where by putting salt on a switch the snow was melted and covered the switch from sight.

*Rhode Island.* — Lee v. Union R. Co., 12 R. I. 333.

*Wisconsin.* — Gerrard v. La Crosse City Ry. Co., 113 Wis. 258, 89 N. W. 125, where the company negligently caused the snow and ice on its tracks to be excavated and removed so as to leave a deep ditch dangerous to public travel.

**47.** Ovington v. Lowell & S. St. R. Co., 163 Mass. 440, 40 N. E. 767; Newport News, etc., Ry. & E. Co. v. Bradford, 3 Va. Super. Ct. 15, 37 S. E. 807, 4 Va. Super. Ct. 219, 40 S. E. 900, the contention that the street was not a public highway was of no avail.

snow, and no liability for a failure to do so follows, unless neglect is shown on the part of the company in allowing the street to remain in a dangerous condition by reason thereof for an unreasonable length of time.<sup>48</sup>

§ 374. *As to switches.* — As to third persons, it is the duty of a street railroad company to keep in repair that portion of a switch which is part of its own track and connects with the track of another company, although the duty of repairing, as between the companies, may belong to the latter, and when it occupies part of a public street with footway approaches to a bridge on which its tracks are laid, it is bound to keep the approaches in good repair.<sup>49</sup> And where plaintiff's sleigh was upset by striking against a switch, and the evidence tended to show that the switch was higher above the pavement than was necessary or reasonable, and accidents frequently happened to other passing vehicles from the same cause, in an action to recover damages it was held that the evidence justified a submission of the question of defendant's negligence to the jury.<sup>50</sup> So, in a suit brought against a street railway company to recover for the death of a pedestrian in a street, caused by his being hit by the rear end of a car which left the track because of the "splitting" of a switch, proof of the happening of the accident is sufficient to charge the company with negligence, and to place upon it the burden of showing that the injuries resulting in death were not received through any fault on its part.<sup>51</sup> A street railway company, however, is not liable absolutely for keeping an appliance, such as a switch, in the street which, in some measure, increased the danger of travel; but only if it kept a wrong appliance (*i. e.*, one unsafe as compared with others in use), or the right one in a wrong condition, and whether

48. *Silberstein v. Houston, etc., R. Co.*, 117 N. Y. 293, 22 N. E. 951, 27 St. Rep. (N. Y.) 330.

49. *McKenna v. Met. R. Co.*, 112 Mass. 55; *Murphy v. Suburban R. T. Co.*, 15 N. Y. Supp. 837.

Construction and maintenance of

switches. See note 6 St. Ry Rep. 9.

50. *Wooley v. Grand St. & Newton R. Co.*, 85 N. Y. 121.

51. *Najarian v. Jersey City H. & P. St. Ry. Co.*, 77 N. J. L. 704, 73 Atl. 527.

it did either of these things or not, depends on circumstances such as the necessity for the switch, the authority under which it was laid, the degree of risk it entailed, the care employed to minimize the risk, and especially to arrange the appliance, if possible, so that it would play over so narrow an arc that wheels would not be caught between it and the rail next to it.<sup>52</sup> So the fact that the plaintiff's wagon wheel caught in a switch device, whereby plaintiff was thrown and injured, will not, *ipso facto*, furnish the basis for a verdict against defendant, where the latter presented uncontradicted exculpatory proof that the switch was of standard pattern and in general use, and that it was properly laid and inspected.<sup>53</sup>

§ 375. Condition of cars and appliances. — The duty of a street railway company to equip its cars with safety appliances is not limited by their convenience, but includes the adoption of such as men of average prudence would use under the same circumstances, and the use of one appliance instead of another, as for example, the use of the brake, instead of the reverse, may be a circumstance from which to determine negligence, in a case of injury to one lawfully traveling on the highway.<sup>54</sup> Where a street car is equipped with defective appliances for control, to the knowledge of the company, it is not freed from responsibility for collision with a person coming suddenly in front of it, by the motorman, on discovering such person, doing all that he could with the equipments.<sup>55</sup> But to justify recovery for a child's

52. *Morie v. St. Louis Transit Co.*, 116 Mo. App. 12, 6 St. Ry. Rep. 1, 91 S. W. 962.

53. *Alcott v. Public Service Corp.* of N. J., 77 N. J. L. 110, 71 Atl. 45.

54. *Warren v. Manchester St. Ry. Co.*, 70 N. H. 352, 47 Atl. 785.

55. *Roberts v. Spokane St. Ry. Co.*, 23 Wash. 325, 63 Pac. 506; *Dint-ruff v. Rochester City & B. R. Co.*, 32 St. Rep. (N. Y.) 730, 10 N. Y. Supp. 402; *affd.*, 124 N. Y. 647, 27 N. E. 412, where the driver of de-

fendant's horse car would have been able to control the horses and thus prevent an accident, but for the fact that the rear brake had been tied down to prevent interference therewith by mischievous boys, and thus neutralized the power of the front brake; *Thompson v. Salt Lake R. T. Co.*, 16 Utah 281, 53 Pac. 92, 40 L. R. A. 172, 10 Am. & Eng. R. Cas. N. S. 563, where the brakes of an electric car were so defective that they did not work well, and the motor

death by being run over by a street car, upon the ground of a defective brake, it must appear that the accident could have been avoided if the brake had been in good condition.<sup>56</sup> A street railway company is not relieved from liability for an injury to a person walking in the highway, caused by the breaking of a wire cable used in controlling the movements of its cars on a steep incline, although the method employed was an improved one and the appliance had been constructed by skilful mechanics, where such cable was known to the company to be defective and had broken before.<sup>57</sup> The breaking of the apparatus used to keep trolley wires in place causing personal injuries to persons traveling upon the street, if unexplained, raises a presumption of negligence on the part of the company.<sup>58</sup> Where an electric railroad company was raising on a pole a feed wire, and a small boy, starting to cross the street, stepped across the wire, which lay in the gutter, just as it was suddenly, without any notice of its presence or intention to lift it, raised, with such force that the boy was thrown many feet into the air and injured, the company was held negligent.<sup>59</sup> Although the right of a street railway to the part of the street occupied by its rails is only in common with that of other travelers, it has an exclusive right thereto for a reasonable time for the use of a usual and ordinary appliance for repairing an overhead wire, where such use must be exclusive to be available.<sup>60</sup> The right of a street railroad to operate its cars by other power than that specified in its charter can only be raised by the government with whom its contract was made, and is not subject to collateral attack in a private action to recover for injuries.

so defective that the motorman received a shock which delayed him, while trying to stop the car to avoid an accident. *Little Rock Tract. & El. Co. v. Morrison*, 69 Ark. 289, 62 S. W. 1045.

**56.** *Gannon v. New Orleans City & L. R. Co.*, 48 La. Ann. 1002, 20 So. 223.

**57.** *Musser v. Lancaster City St.*

*Ry. Co.*, 176 Pa. St. 621, 35 Atl. 206, 39 W. N. C. 37, 13 Lanc. L. Rev. 369.

**58.** *Uggle v. West End St. Ry. Co.*, 160 Mass. 352, 5 Am. Electl. Cas. 389, 35 N. E. 1126.

**59.** *Devine v. Brooklyn H. R. Co.*, 1 App. Div. (N. Y.) 237, 37 N. Y. Supp. 170, 6 Am. Electl. Cas. 318.

**60.** *Potter v. Scranton Tract. Co.*,

Though a corporation was chartered to operate street cars by animal power, and actually operated them by an underground cable, in excess of its powers, it was not liable for a collision, merely because of the fact that the act of the adoption and use of such power was *ultra vires*, without a showing of negligence.<sup>61</sup> It is not enough to show that by some possibility the injury might have been caused by the negligence of the defendant. It must be shown that the defendant committed some negligent act or omitted some duty, and that such act or omission caused the injury. The rule is that where the facts are as consistent with care as with the want of it, no recovery can be had.<sup>62</sup>

§ 376. Negligence in providing fenders and other guards. — It is not necessarily negligence on the part of a street railroad company to fail to provide its cars with fenders to prevent running over children, and a company was not negligent in failing to provide fenders upon its electric cars where at the time of the accident there was but one company in the State that used fenders and their use was only experimental.<sup>63</sup> Where in an action against a street railway company to recover damages for the death of plaintiff's intestate, who was run over by a car of defendant, one of the grounds of negligence alleged was that it operated the car without a fender, and it appeared that while the defendant was required by a city ordinance to use fenders on all its cars it was

176 Pa. St. 271, 38 W. N. C. 453, 35 Atl. 188, 4 Am. & Eng. R. Cas. N. S. 307.

61. Chicago Gen. Ry. Co. v. Chicago City Ry. Co., 87 Ill. App. 17; affd., 186 Ill. 219, 57 N. E. 822.

62. McCaffrey v. Twenty-third St. R. Co., 47 Hun (N. Y.) 404, an action to recover for injuries caused by stepping upon a coil of wire trailing behind one of the defendant's street cars, such wire being no part of the gearing of the car. Baulec v. New York, etc., R. Co., 59 N. Y. 356;

French v. Buffalo, etc., R. Co., 2 Abb. Ct. App. Dec. (N. Y.) 196.

63. Hogan v. Citizens' St. R. Co., 150 Mo. 36, 51 S. W. 473; Mullen v. Springfield St. R. Co., 164 Mass. 450, 41 N. E. 664, 6 Am. Electl. Cas. 492; Buente v. Pittsburgh, etc., Tract. Co., 2 Pa. Super. Ct. 185, a municipal ordinance requiring all street railway companies to be provided with the "most improved modern pilot or safety guard" imposes on such a company a higher duty than is imposed by law, and it cannot be in-

prohibited by the same ordinance from using any fender until the same should have been approved by the common council; that on the day after the adoption by the common council of a report approving the use of a specified fender, the fenders were ordered from the manufacturers, but were not received until after the accident, it was held to be reversible error for the trial court to omit to charge defendant's request that it was not bound to have a fender on the car at the time of the accident and to instruct the jury that it might find whether the defendant had used reasonable diligence in providing fenders after the approval of the common council, since the proof showed that it acted promptly when in a position to act at all.<sup>64</sup> Under a statute providing that a street railway company shall use "in the front of each motor car a fender," the word "front" means that end of the car which, when in motion, is the farthest forward.<sup>65</sup> But although a municipal ordinance literally construed might require that electric street car companies keep fenders on "trailer" cars which have no motors, this construction would be unreasonable and the ordinance should not be so interpreted.<sup>66</sup> Where fenders were attached to both ends of a street car, but intended to project only from the front end, and the rear one had become disarranged without the knowledge of defendant's employees, and a passenger alighting from the car and passing behind was injured by falling over the fender, the company was not held liable.<sup>67</sup> The purposes for which

voked in favor of one whose child is run over and killed by one of its cars. *West Chicago St. R. Co. v. Sullivan*, 165 Ill. 302, 46 N. E. 234; affg. 64 Ill. App. 628.

**64.** *Platt v. Albany Ry.*, 170 N. Y. 115, 62 N. E. 1071.

In West Virginia it has been decided that where, by valid municipal ordinance, street cars are required to be equipped with fenders of an improved make, it is negligence *per se* to operate such cars without such equipment. *Ashley v. Kanawha Val-*

*ley Traction Co.*, 60 W. Va. 306, 55 S. E. 1016.

**65.** *City of Toronto v. Toronto R. W. Co.*, 10 Ont. L. Rep. 730.

**66.** *Von Diest v. San Antonio Traction Co.*, 33 Tex. Civ. App. 577, 77 S. W. 632.

**67.** *Gargan v. West End St. Ry. Co.*, 176 Mass. 106, 57 N. E. 217, 49 L. R. A. 421. Where, in an action against an electric railway company, there was no allegation of negligence in failing to lower the life-guard, the admission of evidence tend-

enders are used on street cars is a matter of which judicial notice may be taken, and the court may instruct the jury as to their use, etc.<sup>68</sup> It is not negligence *per se* for an electric car not to have a headlight after nightfall, where colored signal lights in front and rear, required by a city ordinance, are carried.<sup>69</sup> Where a street railroad company runs its cars over a cut in the street on a bridge constructed by the company, or has left excavations along its tracks in making repairs, the question of its negligence in not putting up railings along the sides of the bridge or fencing in the excavation is for the jury.<sup>70</sup> Where the plaintiff was injured while passing along the tracks of the defendant and it appeared that at the time of the injury the defendant had failed to properly equip the car which struck and injured the plaintiff with a proper and sufficient fender, as required by a statute, the court held that such a violation was evidence of negligence to be submitted to the jury, and that if the jury should find as a fact that the failure to have the fender was the proximate cause of the injury, that is to say, that the plaintiff would not have been injured if the defendant had provided its cars with fenders, and that the plaintiff was not guilty of contributory negligence, or, if guilty, that the defendant had the last clear chance to prevent the injury, the plaintiff would be entitled to recover.<sup>71</sup> In any event, the liability of the defendant must be determined by the character of the appliances for avoiding accidents of this kind which are in use at the time the accident occurred, without regard to what was done subsequently in adding other appliances in compliance with an ordinance of the city or for any other reason.<sup>72</sup>

ing to show that the life-guard with which the car was equipped was not lowered was error. *Cleveland, etc., R. Co. v. Nixon*, 21 Ohio C. C. 736, 12 O. C. D. 78.

**68.** *Spiking v. Consolidated Ry. & P. Co.*, 33 Utah 313, 6 St. Ry. Rep. 320, 93 Pac. 838.

**69.** *McGee v. Consol. St. R. Co.*, 102 Mich. 107, 60 N. W. 293, 26 L. R. A. 300, 5 Am. Electl. Cas. 462.

**70.** *Little Rock Tract. & El. Co. v. Dunlap*, 68 Ark. 291, 57 S. W. 938; *Fox v. William Wharton Jr. & Co.*, 64 N. J. L. 453, 45 Atl. 793.

**71.** *Henderson v. Durham Tract. Co.*, 1 St. Ry. Rep. 649, and notes, 132 N. C. 779, 44 S. E. 598.

See *Chicago City Ry. Co. v. O'Donnell*, 114 Ill. App. 359.

**72.** *Zimmerman v. Denver Consolidated Tramway Co.*, 1 St. Ry. Rep.

**§ 377. Injuries from the use of electricity and electric wires.** — Persons using electricity must exercise due and proper care for the protection of all persons in all places where such persons have a right to be. It is the duty of an electric street railway company not only to construct, but to maintain, its plant reasonably safe and secure so far as the public who use the street are concerned. It is bound to the exercise of ordinary care to maintain its wires and other fixtures and appliances, regardful of any inherent danger in them when highly charged, and mindful of the liability of persons, accidentally or while in the pursuit of their lawful employments, to be brought in proximity to or in contact with them, so as not to cause injury to one using the street by his coming in contact with them. It is bound to know the condition of its wires and to keep them safely protected by ordinary and reasonable insulation, and to use ordinary and reasonable inspection to preserve such insulation from such impairment as would render the wires dangerous to those exposed to likelihood of contact with them.<sup>73</sup> In some jurisdictions electric companies are held to a much higher degree of care in these respects.<sup>74</sup> Where

21, and notes 18 Colo. App. 480, 72 Pac. 708.

**73. United States.** — Newark Elec. L. & P. Co. v. Garden, 78 Fed. 74, 39 U. S. App. 416, 23 C. C. A. 649, 37 L. R. A. 725; City of Denver v. Sherret, 31 C. C. A. 499, 60 U. S. App. 104, 88 Fed. 226.

**Georgia.** — Atlanta Consol. R. Co. v. Owings, 97 Ga. 663, 25 S. E. 377, 33 L. R. A. 798.

**Delaware.** — Neal v. Wilmington & N. C. Electric Ry. Co., 3 Penn. 467, 53 Atl. 338, the dangerous character of the wire, the existing condition, and surrounding circumstances are to be considered.

**Illinois.** — Quincy Gas & Elec. Co. v. Bauman, 104 Ill. App. 600, 67 N. E. 807.

**Massachusetts.** — Griffin v. Light

Co., 164 Mass. 492, 41 N. E. 675, 32 L. R. A. 400, 49 Am. St. Rep. 447.

**New York.** — Wagner v. Brooklyn H. R. Co., 69 App. Div. 349, 74 N. Y. Supp. 809; Jones v. Union Ry. Co., 18 App. Div. 267, 64 N. Y. Supp. 321, 7 Am. Electl. Cas. 447.

**Texas.** — Citizens' R. Co. v. Gifford, 19 Tex. Civ. App. 631, 47 S. W. 1041; International L. & P. Co. v. Maxwell, 27 Tex. Civ. App. 294, 65 S. W. 78.

See cases cited in following note and throughout this section.

The transmission of electricity at a high voltage for lawful purposes does not constitute a nuisance *per se*. Mull v. Indianapolis & C. Tr. Co., 169 Ind. 214, 81 N. E. 657.

**74. Must use utmost degree of care to prevent injury.**

a traveler upon the street is injured by coming in contact with fallen wires, or in the case of injuries from the escape of electricity from the cars or rails, the same rule applies as is applicable in cases of injuries to passengers, although as to passengers the company is bound to the use of the highest degree of care and is liable for slight negligence, and there is a presumption of negligence on the part of the company, which it is called upon to explain or rebut.<sup>75</sup> A person going lawfully where electric wires are, while

*Arkansas.* — City Electric St. Ry. Co. v. Conery, 61 Ark. 381, 33 S. W. 426.

*California.* — Girandi v. Electric Imp. Co., 107 Cal. 120, 28 L. R. A. 596, 40 Pac. 108.

*Kentucky.* — Mangan's Admr. v. Louisville Elec. L. Co., 122 Ky. 476, 9 Am. Electl. Cas. 692, 91 S. W. 703; McLaughlin v. Electric L. Co., 100 Ky. 173, 34 L. R. A. 812, 37 S. W. 851; Lexington Ry. Co. v. Fain's Admr., 24 Ky. L. Rep. 1443, 71 S. W. 628.

*Missouri.* — Winkleman v. Kansas City Elec. Co., 110 Mo. App. 184, 9 Am. Electl. Cas. 335, 85 S. W. 99.

*Oregon.* — Perham v. The Portland Elec. Co., 33 Ore. 451, 40 L. R. A. 799, 53 Pac. 14.

**Must exercise highest degree of care.** Macon v. Paducah St. Ry. Co., 23 Ky. L. Rep. 46, 62 S. W. 496; Haynes v. Raleigh Gas Co., 114 N. C. 203, 19 S. E. 344, 26 L. R. A. 810; Will v. Edison Elec. Ill. Co., (Pa. Super. Ct.) 7 Am. Electl. Cas. 642.

**Must exercise reasonable care.**

*Colorado.* — Denver Consol. Elec. Co. v. Simpson, 21 Colo. 371, 41 Pac. 499, 31 L. R. A. 566.

*Iowa.* — Knowlton v. Light Co., 117 Iowa 451, 90 N. W. 818.

*Minnesota.* — Gilbert v. Duluth

General Elec. Co., 115 Minn. 171, 9 Am. Electl. Cas. 166, 100 N. W. 653.

*Montana.* — Bourke v. Butte Electric & P. Co., 33 Mont. 267, 9 Am. Electl. Cas. 566, 83 Pac. 470; Anderson v. Electric Light Co., 63 N. J. L. 387, 43 Atl. 654; Hamilton v. Bordentown Electric Light & Motor Co., 68 N. J. L. 85, 52 Atl. 290.

**Must exercise every means to protect the public from injury regardless of expense.** Cook v. Electric Co., 9 Houst. 306, 32 Atl. 643.

**Must exercise care in proportion to dangers to be avoided.** Economy L. & P. Co. v. Stephens, 87 Ill. App. 220; Jacksonville Elec. L. Co. v. Sloan, 52 Fla. 257, 9 Am. Electl. Cas. 891, 42 So. 516; Parsons v. Charleston Consol. Ry., G. & E. Co., 69 S. C. 305, 9 Am. Electl. Cas. 146, 48 S. E. 284.

**75.** Jones v. Union Ry. Co., 18 App. Div. (N. Y.) 267, 46 N. Y. Supp. 321, 7 Am. Electl. Cas. 447, where one of the span wires, supporting an electric trolley wire, broke, and the end, in falling, struck the plaintiff, as he stood on the side wall, and burned out his eye; Kankakee Elec. R. Co. v. Whittemore, 45 Ill. App. 484, 4 Am. Electl. Cas. 362, where a trolley pole knocked a telephone wire crossing the trolley wire

bound to know generally the danger, has, unless the defective insulation could have been seen with diligence, the right to presume that they are properly insulated, and a traveler on a highway is entitled to assume that it is reasonably safe, and, while required to use reasonable care and caution to avoid danger, is not required to search for obstructions and dangers therein.<sup>76</sup> A street railway company is under obligation to the employees of a telephone company which companies jointly use the same structure to suspend their wires to keep such wires properly suspended and in repair so as not to become dangerous to a person liable to come in contact with them; and this is so as to such employees notwithstanding permission has been granted by the telephone company to the railway company to attach such wires to its poles.<sup>77</sup> An electrical railway company maintaining electrical wires, which have become disarranged, even though it is not negligent, must discover the condition and remove the danger within a reasonable time, and the lapse of a day and a half, will render the railway company liable for injuries occurring thereby, irrespective of the

loose, causing it to fall; *O'Flaherty v. Nassau Elec. R. Co.*, 34 App. Div. (N. Y.) 74, 54 N. Y. Supp. 96; *affd.*, 165 N. Y. 624, 59 N. E. 1128, 7 Am. Electl. Cas. 535, where plaintiff, walking in the street, was thrown twice about the time and place where defendant's trolley wire had fallen and was claimed to have received a shock from the wire; *Denver Tramway Co. v. Reid*, 4 Colo. App. 53, 35 Pac. 269, 4 Am. Electl. Cas. 332; *Gilmore v. Brooklyn Heights R. Co.*, 6 App. Div. (N. Y.) 117, 39 N. Y. Supp. 417, where plaintiff, when entering the car and on the platform, was struck by the brake handle, which was suddenly set free in some unexplained manner; *Clarke v. Nassau Electric Ry. Co.*, 9 App. Div. (N. Y.) 51, 41 N. Y. Supp. 78; *Trenton Pass. Ry. Co. v. Cooper*, 60 N. J. L. 219, 7

Am. Electl. Cas. 444, 37 Atl. 730, where plaintiff's horse, while crossing the railway, was injured by an electric shock; *Braham v. Nassau Electric Ry. Co.*, 72 App. Div. (N. Y.) 456, 76 N. Y. Supp. 578, where a person, while crossing a street car track, stepped on a rail and received a shock and it clearly appeared that the shock would have been impossible if the track had been in good order.

**76.** *Will v. Edison Elec. Ill. Co.*, (Pa. Super. Ct.) 7 Am. Electl. Cas. 642; *Neal v. Wilmington & N. E. Electric Ry. Co.*, 3 Penn. (Del.) 467, 53 Atl. 338, where a guy wire supporting an electric trolley line fell and became charged with electricity.

**77.** *Gentzkow v. Portland Ry. Co.*, 54 Oreg. 114, 6 St. Ry. Rep. 642, 102 Pac. 614.

cause of the disarrangement, it being bound to maintain constant inspection.<sup>78</sup> And where it is shown that an accident was caused by the breaking or sagging of a trolley wire, such condition having existed for two weeks, and the company having admitted it upon the trial of an action for injuries to one passing under the wire, it was held that the court was privileged to determine whether the facts constituted such negligence as to entitle that feature to be taken from the jury, and to instruct the jury accordingly.<sup>79</sup> But a street railway company shows due diligence where, after discovering with reasonable promptness the sagging of one of its trolley wires, it immediately takes steps to prevent the wire from causing injury to travelers in the street over which the wire is suspended.<sup>80</sup> Where wires of an electrical railway company have become disarranged, the inference is that it was caused by the company or its servants for the purpose of rearranging such wires.<sup>81</sup>

**§ 378. Injuries from use of electricity and electric wires continued — Application of rules.** — A street railroad company is not liable for an injury to a boy who has climbed upon the arched girder supporting a bridge over which its line is constructed, and along which girder its trolley wire and the guard wire protecting it runs, where the guard wire, designed to be a dead wire, by accident becomes charged with electricity and the boy receives a shock therefrom and is thrown to the bridge below, since it owed no duty to the injured person under the circumstances and was not liable for negligence in allowing the wire to become charged with electricity.<sup>82</sup> Nor is it liable to the servant of another company for an injury sustained by him by contact with its wires while climb-

**78.** *Gentzkow v. Portland Ry. Co.*, 54 Oreg. 114, 6 St. Ry. Rep. 642, 102 Pac. 614.

**79.** *Crosby v. Portland Ry. Co.*, 53 Oreg. 496, 6 St. Ry. Rep. 685, 101 Pac. 204.

**80.** *Read v. City & Suburban Ry. Co.*, 115 Ga. 366, 41 S. E. 629, notice to a motorman or conductor of such sagging is not notice to the corpora-

tion, as neither has any authority over or duty to perform in regard to such wires.

**81.** *Geutzkow v. Portland Ry. Co.*, 54 Oreg. 114, 6 St. Ry. Rep. 642, 102 Pac. 614.

**82.** *Freeman v. Brooklyn Heights R. Co.*, 54 App. Div. (N. Y.) 506, 66 N. Y. Supp. 1052.

ing its electric poles in the prosecution of business for the other company, when permission to enter upon the property of defendant or knowledge of his so doing was not alleged or shown.<sup>83</sup> And where a trolley pole came in contact with a steel brace which was being raised for the construction of an elevated railroad, the motor-man having negligently caused the pole to strike such brace, and there was a brilliant electrical explosion, and a woman seated at a window in a house three hundred feet distant fell from her chair and was temporarily blinded and rendered nervous, but the glass in the window was not broken and nothing else in the room was disturbed; it was held that the railway company was not liable for the nervous shock, etc., because the accident was of an extraordinary character from which no such results could have been anticipated.<sup>84</sup> But where an electric light company had, by permission, strung its wires across the top of a bridge belonging to a railroad company and the wires were not actually insulated, and the latter company was not informed of the fact, the former was held liable for the death of an employee of the railroad company who was repairing the bridge, and in ignorance of the danger of his act on account of the apparent perfect insulation, touched two wires at once and was instantly killed.<sup>85</sup> Where owing to the faulty construction of a street railway, and the negligent operation of the same, escaping electricity is continually damaging and destroying water pipes maintained by the city, the company will be enjoined in a suit by the city from so operating its lines as to cause such injury.<sup>86</sup> And where the power house of a railway and light company become injurious to adjoining property by reason of escaping electricity, vibration of the machinery, and smoke, a nuisance is created which will render the company liable in damages for the injuries sustained.<sup>87</sup> Where the insulator of the con-

**83.** *Augusta Ry. Co. v. Andrews*, 89 Ga. 653, 4 Am. Electl. Cas. 378, 16 S. E. 203.

**84.** *Chittick v. Philadelphia Rapid Transit Co.*, 224 Pa. St. 13, 6 St. Ry. Rep. 671, 73 Atl. 4.

**85.** *Perham v. The Portland Elec.*

*Co.*, 33 Oreg. 451, 7 Am. Electl. Cas. 487, 53 Pac. 14, 40 L. R. A. 799.

**86.** *Dayton v. City Ry. Co.*, 9 Am. Electl. Cas. 267, 26 Ohio Cir. Ct. 736.

**87.** *Townsend v. Norfolk Ry. & L. Co.*, 105 Va. 22, 52 S. E. 970.

ductor rails of an underground trolley railway gets out of repair, or the conductor conduit becomes filled with snow or moisture, so as to charge the slot rail with electricity, without any negligence on the part of the railway company, it is not liable for injuries to pedestrians, caused by such conditions, unless it fails to remedy the defects within a reasonable time after actual or constructive notice thereof.<sup>88</sup> And where the plaintiff claimed to have been injured by an electrical shock received in stepping upon a rail and the court charged that: "If he did receive an electrical shock by stepping upon the rails of this track, and was injured in that manner, he is entitled to recover," and refused to charge as follows: "That if they (the jury) believe the plaintiff received an electrical shock at the time alleged and in the manner described by the plaintiff, unless they are satisfied that the defendant has exonerated itself, they may bring in a verdict for the plaintiff upon that evidence," and said, in this connection: "Whether the defendant has exonerated itself or not, if they believe he received an electrical shock he is entitled to recover," exceptions thereto were sustained on appeal.<sup>89</sup> A street railway company is not chargeable with negligence toward a person riding for his own convenience on the top of a box car on a railroad crossing the line of the street railway, in maintaining a trolley wire at a height insufficient to permit of the passage of a person standing upright upon an unusually high car, but high enough to admit of the passage of persons standing on an ordinary car, or of a person sitting on a high car.<sup>90</sup> Nor is it liable in an action to recover for injuries alleged to have been sustained by its negligence in failing to properly insulate a wire, where it appears that the wire

88. *Ludwig v. Met. St. Ry. Co.*, 71 App. Div. (N. Y.) 210, 75 N. Y. Supp. 667.

89. *Sullivan v. Brooklyn Heights Ry. Co.*, 117 App. Div. (N. Y.) 784, 6 St. Ry. Rep. 850, 102 N. Y. Supp. 982.

90. *Gross v. South Chicago City R. Co.*, 73 Ill. App. 217, 30 Chic. Leg.

N. 186. But the company is negligent when it so places one of its guy wires over the track of a steam railroad as not to afford sufficient space for the latter's trains easily and conveniently to pass without danger to servants and employees. *Erslew v. New Orleans & N. E. R. Co.*, 49 La. Ann. 86, 21 So. 153.

was insulated immediately before the time of the alleged injury, and that the insulation was the usual, ordinary, and safe plan of insulation to protect the public from injury, and was intact up to the time plaintiff took hold of the wire.<sup>91</sup> When plaintiff, a brakeman on a railroad crossed by an electric street railroad, knew that the trolley wire sagged so low that it was necessary to stoop in order to pass under it with safety while on the top of the car, his ignorance of the danger attending contact with an electric wire in no way excused his fault in failing to exercise that reasonable care which would have enabled him to pass beneath the wire with safety.<sup>92</sup> Railroad commissioners have no arbitrary power to require electric street railroad wires to be suspended at any particular number of feet above the roadbed of a steam railroad crossed by such wires, unless it appears that a less height is insufficient to prevent danger to the steam road's employees; and where the latter cut the wires, causing great loss to the street railroad company and great danger to human life, the steam railroad company is a trespasser, *ab initio*, and liable for all damages sustained by the street railroad company.<sup>93</sup>

**§ 379. Interference with telephone or other light current wires.**

— The operation of an electric street railroad or electric light system which makes use of powerful electric currents, often seriously interferes with the proper working of a telephone system, which requires a delicate, sensitive electric current with accurate pulsations, where the wires of the two systems occupy the same street. Interference by induction takes place where the wires of the two systems run closely parallel for long distances, the electric fluid escaping from the more powerful wire and being inducted by the atmosphere into the adjacent telephone wires. But the atmosphere is a poor conductor and injury of this character is easily preventible by placing the wires a reasonable distance apart

**91.** Tri-City Ry. Co. v. Killeen, 92 Ill. App. 57.

**93.** Saginaw Union St. R. Co. v. Michigan C. R. Co., 91 Mich. 657, 52 N. W. 49.

**92.** Danville Street Car Co. v. Watkins, 97 Va. 713, 34 S. E. 884.

and by using proper insulation. The disturbances arising from conduction or leakage, which results from the use of the earth as a return circuit for both systems, the more powerful current uniting with and absorbing the weaker current, are a source of more serious injury and are more difficult to prevent. The only known way of preventing these is by the use of a metallic return circuit which is expensive, but can be used by the telephone companies at a comparatively small cost, and is actually used by most electric light companies. The electric railway, however, uses its rails for conductors and these, not being insulated, affect other currents; a proper metallic circuit could be made only by a return wire kept in constant connection with each car by a second trolley, which is very expensive to build and is complicated in its operation. By the McCluer device the telephone company can use a common return wire for all its instruments, without heavy expense. This interference of electrical appliances with each other has given rise to much litigation in which telephone companies have sought to secure relief for injuries sustained from the proximity of the wires of other companies, and from their use of the earth as a return circuit, where the telephone companies had secured, as they claimed, a prior right of occupancy.<sup>94</sup> As to the first class of cases, relief has been granted by the courts, where the complaining company had a prior right of occupancy to the space covered by its wires, and the company having such prior right has been protected in the beneficial use of it as against a subsequent occupant. It has been held in that connection that it is the duty of a telephone company, having its line along a street, so to construct its line as not to interfere with the free use of the street by the public for purposes of travel and transportation, and that this duty includes the precautions necessary to keep its wires from coming in contact with those of a street railway subsequently occupying the

94. Hudson River Telephone Co. v. Watervliet Turnpike & Railway Co., 135 N. Y. 393, 32 N. E. 148, 56 Hun (N. Y.) 67, 9 N. Y. Supp. 177, 61 Hun (N. Y.) 141, 15 N. Y. Supp. 752; Cumberland Telegraph & Telephone

Co. v. United Electric R. Co., 42 Fed. 273, 4 Am. & Eng. R. Cas. 194, 93 Tenn. 492, 29 S. W. 104, 10 Am. Ry. & Corp. Rep. 549, 27 L. R. A. 236; and cases cited in the following notes to this section.

street, and requires it to change its wires to allow the erection of the trolley wires of an electric railway, when they are so placed as to interfere therewith; that the electric railway company, in constructing its road and erecting its wires in a street in which a telephone company has its wires, is bound to use guard wires and other known and recognized reasonable precautions and appliances, if the result can be so obtained, which will prevent contact between its wires and those of the telephone company and consequent injury to the latter therefrom.<sup>95</sup> In the second class of cases, those of injury arising from conduction or leakage, the question of the prior right of occupancy has been considered immaterial, and the courts have held that interference with the ground circuit of a telephone system previously established, the poles and wires of which are upon the streets, by the subsequent introduction of the "single-trolley system" of electric street railways, of which the ground is also a constituent part, interferes with no vested right of the telephone company, and gives it no right of action, and it has no remedy except to readjust its methods to meet the new conditions.<sup>96</sup> The decisions rest upon the ground that when a

**95.** *Central Pa. Telephone Co. v. Wilkes-Barre, etc., R. Co.*, 11 Pa. Co. Ct. 417, 1 Pa. Dist. Rep. 628, 6 Kulp (Pa.) 383, 4 Am. Electl. Cas. 260. The cases based on injury from induction have been in most instances with electric light companies whose wires have been erected close to telephone wires, while electric railway wires above ground are seldom so located. On the other hand, the electric light companies, which make use of a metallic return circuit, have had no litigation because of injuries by conduction, cases of this character arising only between telephone companies and the electric street railway companies.

Though a telephone or a telegraph company obtains no exclusive right to the streets along which its line is

constructed for the operation of its system by reason of its prior occupancy of the same, yet such occupancy may be considered in denial of a street railway company's right to exclude the former company in constructing its line. So a railway company may be enjoined where the operation of its line causes actual present injury to a telephone company by reason of the latter's wires being short circuited and grounded owing to the location of the trolley wires in such close proximity thereto. *Birmingham Traction Co. v. Southern Bell Teleph. & Teleg. Co.*, 119 Ala. 144, 7 Am. Electl. Cas. 405, 24 So. 731.

**96.** *Cincinnati Inclined Plane R. Co. v. City & S. Teleg. Ass'n*, 48 Ohio St. 390, 12 L. R. A. 534, 46 Am. &

street railway is making lawful use of a franchise to maintain a system of electric traction, conferred upon it by the State in a manner contemplated by the statute, and in so doing causes injury to another, its liability depends upon whether the rights conferred are utilized with proper care and skill. It is not bound to adopt expensive devices, nor the most recent inventions, nor make a complete change of its system including the use of motors which are more expensive, more dangerous, and less useful and efficient, when the injured company might protect itself by the use of an effective and inexpensive device. The primary and dominant purpose of a street is for public passage, and any appropriation of it by legislative sanction to other objects must be deemed to be in subordination to this use, unless a contrary intent is clearly expressed. The inconvenience or loss which others may suffer from the adoption of a mode of locomotion authorized by law, which is carefully and skilfully employed, and which does not destroy or impair the usefulness of a street as a public way, is not a direct consequence of the construction of the system, but merely incidental to its operation, and therefore is not sufficient cause for a recovery, unless there is some statute which makes it actionable.<sup>97</sup> Upon the question of interference by induction and conduction of the wires of a street railway company with those of a telegraph or telephone company, it is said that it is the duty of each company, in the employment of its right, to use reasonable care to prevent injury to the other, that the law will protect each in the enjoyment of its rights, but not in the negligent employment of them, and that priority of time will not give any immunity

Eng. R. Cas. 588, 26 Ohio L. J. 8, 27 N. E. 890, 10 Ry. & Corp. L. J. 82, 44 Alb. L. J. 86.

**97.** Hudson River Teleph. Co. v. Watervliet Turnpike & Railway Co., 135 N. Y. 393, 17 L. R. A. 675, 48 St. Rep. (N. Y.) 417, 32 N. E. 148, 31 Am. St. Rep. 838, 4 Am. Electl. Cas. 275, 6 Am. R. & Corp. Rep. 619; National Teleg. Co. v. Baker, 2 Ch. 186, 47 Alb. L. J. 411, 68 L. T. Rep. N. S.

283; Bell Teleph. Co. v. Montreal St. R. Co., (Can.) Rap. Jud. Quebec, 10 C. S. 162, 6 Br. 223, a telephone company whose service is interfered with by adoption, by a street railway company, of electricity as a motive power, cannot recover from the latter company the cost of converting its earth circuit system into a return wire system, rendered necessary by such interference.

to such a company from the use of reasonable care. And in such a case it is the duty of every person to employ all reasonable means to protect himself and any valuable right that he may possess from injury if he wishes to hold any other person responsible for the loss that he causes, and one in the enjoyment of a valuable right of property, or otherwise about to receive irreparable injury from the enjoyment of some other right by another which either might prevent by the use of reasonable means, cannot obtain any injunction restraining the other from the enjoyment of his right until he adopts such reasonable means. In such a case the party about to be injured holds the remedy in his own hands, and the law requires him to use it.<sup>98</sup> To authorize the recovery of damages, or the issuance of an injunction to prevent injury, the complaining company must show negligence in the exercise of the franchise conferred upon the defendant, as the proximate cause of the injuries complained of, or wanton and unnecessary disregard of the rights of the complainant.<sup>99</sup> An electric railroad company, using strong

**98.** *Rocky Mountain Bell Teleph. Co. v. Salt Lake City R. Co.*, — Utah —, 3 Am. Electl. Cas. 356, *per* ZANE, J., so declaring in denying an application by a telephone company for an injunction restraining an electric railway company a later licensee, from so maintaining its wires in the streets of a city as to interfere by induction and conduction with plaintiff's telephone service, it appearing that it was in the power of the plaintiff to adopt an effective remedy. See also to similar effect *Wisconsin Teleph. Co. v. Eau Claire St. Ry. Co.*, (Wis. 1890) 3 Am. Electl. Cas. 383.

**99.** *Cumberland Telegraph & Telephone Co. v. United Electric Ry. Co.*, 42 Fed. 273, 4 Am. & Eng. R. Cas. 194, 93 Tenn. 492, 29 S. W. 104, 10 Am. Ry. Corp. L. Rep. 549, 27 L. R. A. 236; *Hudson River Telephone Co. v. Watervliet Turnpike & Railway Co.*, 135 N. Y. 393, 17 L. R. A. 675,

48 St. Rep. (N. Y.) 417, 32 N. E. 148, 31 Am. St. Rep. 838, 6 Am. R. & Corp. Rep. 619. In the case last cited the court further says: "The defendant allows the electric current used for the movement of its cars to escape or discharge, at least in part, directly from the rails into the ground, from whence it spreads or flows, by reason of the conductivity of the earth, upon the plaintiff's grounded wires, and the most serious loss which the plaintiff sustains results from this cause, which is scientifically known as conduction. The defendant insists that it has an equal right with plaintiff to make use of this property or law of nature, in the conduct of its business, just as all are entitled to the common use of the air and the light of the heavens, which, in a certain sense, is undoubtedly true. But the defendant does something more. It does not leave

currents of electricity on wires which are not insulated, which directly cross telephone wires which are insulated, may be compelled to place guard wires where they will prevent the contact of the telephone and railway wires in case of the breaking of poles or the falling of wires on account of storms or otherwise, especially where there is an ordinance requiring such guard wires, which the telephone company has complied with. An ordinance requiring such guard wires "whenever it shall be necessary to cross" other

the natural forces of matter free to act unaffected by any interference on its part. It generates and accumulates electricity in large and turbulent quantities, and then allows it to escape upon the premises occupied by the plaintiff to its damage.

"We are not prepared to hold that a person even in the prosecution of a lawful trade or business, upon his own land, can gather there by artificial means a natural element like electricity, and discharge it in such volume, that, owing to the conductive properties of the earth, it will be conveyed upon the grounds of his neighbor with such force and to such extent as to break up his business, or impair the value of his property, and not be held responsible for the resulting injury. The possibilities of the manifold industrial and commercial uses to which electricity may eventually be adapted and which are even now foreshadowed by the achievements of science, are so great as to lead us to hesitate before declaring an exemption from liability in such a case. It is difficult to see how responsibility is diminished or avoided, because the actor is aided in the accomplishment of the result by a natural law. It is not the operation of the law to which the plaintiff objects, but the projection upon its premises

by unnatural and artificial causes of an electric current in such a manner and with such intensity as to materially injure its property. It cannot be questioned that one has the right to accumulate water upon his own real property and use it as a motive power; but he cannot discharge it there in such quantities that, by the action of physical forces, it will inundate his neighbor's lands and destroy his property, and shield himself from liability by the plea that it was not his act, but an inexorable law of nature that caused the damage. Except where the franchise is to be exercised for the benefit of the public the corporate character of the aggressor can make no difference. The legislative authority is required to enable it to do business in its corporate form, but such authority carries with it no lawful right to do an act which would be a trespass if done by a private person conducting a like business. If either collects for pleasure or profit the subtle and imperceptible electric fluid, there would seem to be no great hardship in imposing upon it, or him, the same duty which is exacted of the owner of the accumulated water power; that of providing an artificial conduit for the artificial product, if necessary to prevent injuries to others. But the

electric wires, applies to crossing wires already erected, since it provides a remedy for an existing evil.<sup>1</sup> The lack of guard wires between trolley wires and telephone wires will render a trolley company liable for injury to a person in the street by contact with a broken telephone wire, if the omission of the guard wires was negligent, and was also the proximate cause of the injury, and the company is liable for the killing of a horse by coming in contact with a telephone wire lying across its trolley wire, where it knows, or should know, of the situation of such wire in time to remove it and prevent accidents.<sup>2</sup> An electric street railway company is not required to exercise the "utmost degree of care and diligence" to keep a feed wire, placed several feet above the heads of travelers, insulated so as to prevent the communication of electricity to a lineman of a telephone company who draws a telephone wire over the upper side of such feed wire.<sup>3</sup> And, where the telephone company rents the use of a street railroad company's poles and assumes all risks for damages to its employees, an employee of the telephone company, injured while repairing a leak caused by the railroad company's guard wire sagging so that it came in contact with the trolley wire whenever a car passed be-

record before us does not require a determination of the question in this form."

1. *State, Wisconsin Teleph. Co. v. Janesville St. R. Co.*, 87 Wis. 72, 57 N. W. 970, 22 L. R. A. 759, 9 Am. Ry. & Corp. Rep. 319, 41 Am. St. Rep. 23. And see *Rowe v. New York & N. J. Tel. Co.*, 66 N. J. L. 19, 48 Atl. 523, where there were no guards to prevent one of the upper wires, that fell, from coming in contact with the lower wires, and thus conducting their dangerous current down to the surface of the street, a finding that both defendants had neglected their duty to travelers on the highway was sustained.

2. *Block v. Milwaukee St. R. Co.*,

89 Wis. 371, 61 N. W. 1101, 27 L. R. A. 365, 46 Am. St. Rep. 849, 11 Am. R. & Corp. Rep. 540, 1 Am. & Eng. R. Cas. N. S. 329; *Godfrey v. Streator R. Co.*, 56 Ill. App. 378. But a telephone company is not, as matter of law, negligent in failing to remove a rusted wire which was liable to break and come in contact with a highly charged trolley wire, when it had no knowledge of its condition. *Hand v. Cent. Pa. Tel. & L. Co.*, (C. P.) 1 Lack. Leg. N. 351.

3. *Calumet Elec. St. R. Co. v. Grosse*, 70 Ill. App. 381. The provisions of the Ohio Act (83 Ohio L. 143) forbidding the use of uninsulated wires, does not affect the use of wires in city streets for conduct-

neath, it not appearing that the telephone company had the right, or was requested to repair the railroad company's wires, cannot recover against the railroad company.<sup>4</sup> The use of the same poles by a telephone company and an electric railroad company, at the request of the municipal authorities, is not unlawful when it is not shown to be necessarily attended with increased danger, and a telephone company may require its lineman to inspect and test for himself the guy wires or circuit breakers of an electric railroad company using the same poles, when it furnished him with suitable appliances for the purpose, and he knows that there are no other persons employed to do such testing.<sup>5</sup> The right of a telephone lineman to assume that an electric railroad company has used suitable and safe appliances to prevent the escape of electricity from its main or trolley wire to the guy wires does not excuse him from exercising proper care to prevent injury, when he knows as a fact that the wires are not safe.<sup>6</sup> The escape of a dangerous current of electricity from wires suspended over streets, through any other wires that may come in contact with them, must be prevented so far as it can be done by the exercise of reasonable care and diligence. The care exercised must be commensurate with the great danger that exists, although the owners of such wires are not insurers against accidents.<sup>7</sup> A corporation employing a

ing electricity to operate street railroads. *Simmons v. Toledo*, 5 Ohio C. C. 124.

4. *Sias v. Lowell, etc., St. Ry. Co.*, 179 Mass. 343, 60 N. E. 974.

5. *Bergin v. So. New England Teleg. Co.*, 70 Conn. 54, 38 Atl. 888, 39 L. R. A. 192.

6. *Bergin v. So. New England Teleg. Co.*, 70 Conn. 54, 38 Atl. 888, 39 L. R. A. 192; *Newark Elec. L. & P. Co. v. Gardner*, (C. C. A. 3d C.) 78 Fed. 74, 39 U. S. App. 416, 23 C. C. A. 649; *Cumberland Telegraph & Telephone Co. v. United Elec. R. Co.*, 93 Tenn. 492, 29 S. W. 104, 27 L. R. A. 236, 10 Am. Ry. & Corp. Rep. 549,

4 Am. & Eng. R. Cas. 194; *Jackson & S. St. R. Co. v. Simmon*, 107 Tenn. 392, 64 S. W. 705, 23 Am. & Eng. R. Cas. N. S. 236.

7. *City Elec. St. R. Co. v. Conery*, 61 Ark. 381, 33 S. W. 426, 31 L. R. A. 570, 3 Am. & Eng. R. Cas. N. S. 365, 6 Am. Electl. Cas. 217; *Uggla v. West End R. Co.*, 160 Mass. 351, 35 N. E. 1126. The violation of a city ordinance imposing a penalty on dangerous driving cannot preclude a recovery against a telephone company for damages because of injury to a horse from contact with a wire suspended in the street, without proof that such driving contributed to the

wire charged with a powerful and dangerous current of electricity, which, by contact with the wires of other corporations, may cause injury or death to the employees of the latter, is charged with the duty of observing at least ordinary diligence, not only to prevent such contact, but also to discover and prevent its continuance, even when occasioned by the negligence of others, including that corporation whose employees are thus exposed to danger.<sup>8</sup> A telephone company and an electric railway company are jointly liable for negligence, where both maintain their wires with knowledge of the danger caused by the want of guard wires between the trolley wire and a telephone wire insecurely suspended over it, and especially when they permit a broken telephone wire to remain suspended across the trolley wire. The telephone company is not excused for negligence in the maintenance of a wire insecurely fastened, because the railroad company was chargeable with the duty of maintaining guard wires and failed to do so, and the railway company cannot escape liability for its negligence, in maintaining a trolley wire charged with a dangerous current without guard wires, and permitting the fallen telephone wire to remain suspended over it, by showing how other trolley wires are erected and maintained by prudent and well-managed electric railway companies.<sup>9</sup>

injury. *Hovey v. Michigan Teleph. Co.*, 124 Mich. 607, 83 N. W. 600, 7 Detroit Leg. N. 353.

8. *Atlanta Consol. St. R. Co. v. Owings*, 97 Ga. 663, 25 S. E. 377, 33 L. R. A. 798, 5 Am. & Eng. R. Cas. N. S. 377; *Huber v. La Crosse City R. Co.*, 92 Wis. 636, 66 N. W. 708, 31 L. R. A. 583, but the coiling of a trolley wire over a span wire in turning a curve in the street, thereby charging the span wire with electricity, is not negligence which will render the street railway company liable to an experienced workman familiar with such wires and their insulation, who is injured by contact with the span

wire while standing on a wooden pole moving the electric lamps, where the span wire had circuit breaks to prevent its charging the iron posts which sustained it, and injury from it could be sustained only by one who completed the circuit between it and the iron posts by touching them both at the same time.

9. *McKay v. So. Bell Teleph. & Teleg. Co.*, 111 Ala. 337, 31 L. R. A. 539, 19 So. 695, 3 Am. & Eng. Corp. Cas. N. S. 605; *United Elec. R. Co. v. Shelton*, 89 Tenn. 423, 14 S. W. 863, 3 Am. Electl. Cas. 477, 46 Am. & Eng. R. Cas. 206, both companies held liable for the value of a horse

§ 380. **Negligence as to signals and lookout.** — Motormen, gripmen, and drivers operating street railroad cars are bound to be watchful at all points, elsewhere as well as at street crossings, especially in a crowded city, and to use all reasonable means to avoid accidents and injury to persons crossing the street, and to respect the equal rights of others to the use of the public streets.<sup>10</sup> Foot passengers, as well as horsemen, and those who operate street cars, have equally a lawful right to use the street for all proper purposes and at all proper places. Street cars, which run upon rails laid down in the street, and cannot turn out, and which are large and heavy vehicles, moved by machinery, necessarily have, to a considerable extent, the right of way, and it is the duty of pedestrians and persons using other vehicles to use reasonable care to avoid them; yet there is a corresponding duty on the part of the

killed by coming in contact with the fallen telephone wire. But a telephone company is not liable for the killing of a horse by the stepping on one of its wires, which has become heavily charged with electricity in consequence of its breaking and falling upon a trolley wire erected after the telephone wires were placed, due solely to the negligence of the employees of the street railway company. *Morgan v. Bell Teleph. Co.*, (Can.) *Rap. Jud. Quebec*, 11 C. S. 103. See also *Jones v. Finch*, 128 Ala. 217, 29 So. 182, where a person negligently causes a telephone wire to fall across a trolley, and remain hanging down into the street, where such telephone wire, charged with electricity from the trolley, would come in contact with passing animals, such negligence is an efficient proximate cause, making him liable for the death of a mule coming in contact with the wire, notwithstanding the negligence of the owner of the trolley in not providing fenders against the

wire, was a conjunctive cause of the injury.

10. *Chicago Gen. Ry. Co. v. Kriz*, 94 Ill. App. 277; *West Chicago St. R. Co. v. Williams*, 87 Ill. App. 548; *Altemeier v. Cincinnati St. R. Co.*, 4 Ohio N. P. 224, 4 Ohio Leg. N. 300; *Swain v. Fourteenth St. R. Co.*, 93 Cal. 179, 28 Pac. 829; *Wells v. Brooklyn City R. Co.*, 56 Hun (N. Y.) 389, 34 St. Rep. (N. Y.) 632, 12 N. Y. Supp. 67; *Moebus v. Herrmann*, 108 N. Y. 349, 15 N. E. 415; *Strutzel v. St. Paul City R. Co.*, 47 Minn. 543, 11 Ry. & Corp. L. J. 132, 50 N. W. 690.

**The conductor of a street car is not required** to keep a lookout to avoid accidents at crossings. *Gebhardt v. St. Louis Transit Co.*, 97 Mo. App. 373, 71 S. W. 448. The conduct of the driver in driving rapidly along a city thoroughfare, without looking ahead, was grossly negligent. *Goldstein v. Dry Dork, E. B. & B. R. Co.*, 35 Misc. Rep. (N. Y.) 200, 71 N. Y. Supp. 477.

drivers of street cars, who must, in the exercise of due care, so control the speed of their cars, and give such notice of the approach of their cars to places where pedestrians and others are using the street, that such persons can avoid them, in the exercise of proper care. This duty is more stringent in the case of corporations, whose cars are of great weight, and are run at a comparatively high rate of speed, so that great care on the part of the gripmen as well as on the part of pedestrians and other travelers is required to avoid serious, if not fatal, accidents. On approaching street crossings, even with usual and ordinary speed, a warning should be given. These rules are well settled and have been established by many authorities.<sup>11</sup> The failure of a street car driver to keep

As to duty of motormen and others in charge of cars, see sections 381, 382, *post*, herein.

11. *Gray v. St. Paul City Ry. Co.*, 87 Minn. 280, 91 N. W. 1106; *Louisville Ry. Co. v. French*, 24 Ky. L. Rep. 1278, 71 S. W. 486; *Mitchell v. Third Ave. R. Co.*, 62 App. Div. (N. Y.) 371, 70 N. Y. Supp. 1118; *Fandel v. Third Ave. R. Co.*, 15 App. Div. (N. Y.) 426, 44 N. Y. Supp. 462; *Owensboro City R. Co. v. Hill*, 21 Ky. L. Rep. 1638, 56 S. W. 21; *Hall v. Ogden City St. R. Co.*, 13 Utah 243, 44 Pac. 1046, 4 Am. & Eng. R. Cas. N. S. 77; *Driscoll v. Market St. Cable R. Co.*, 97 Cal. 553, 33 Am. St. Rep. 203, 32 Pac. 591; *Cytron v. St. Louis Transit Co.*, 205 Mo. 692, 5 St. Ry. Rep. 609, 104 S. W. 109; *Mitchell v. Tacoma R. & M. Co.*, 9 Wash. 120, 37 Pac. 341; *Dennis v. North Jersey St. Ry. Co.*, 64 N. J. L. 439, 45 Atl. 807; *Consol. Trac. Co. v. Scott*, 58 N. J. L. 682, 34 Atl. 1094, 33 L. R. A. 122; *Consol. Trac. Co. v. Chenowith*, 61 N. J. L. 554, 35 Atl. 1068, 5 Am. & Eng. R. Cas. N. S. 599; *Killeen v. Brooklyn Heights R. Co.*, 48 App. Div. (N. Y.) 557, 62 N. Y. Supp. 927,

the negligence of defendant is a question for the jury when it appears that the motorman was engaged in conversation with some one inside the car, and the speed of the car was constantly increased up to within a short distance of the point where the accident occurred. *Watson v. Minneapolis St. R. Co.*, 53 Minn. 551, 55 N. W. 742.

**The sounding of a gong** for some distance of the approach of a motor car to a street crossing is a sufficient warning to travelers in the absence of a statute requiring other or different signals. *Van Patten v. Schenectady St. R. Co.*, 80 Hun (N. Y.) 494, 62 St. Rep. (N. Y.) 378, 30 N. Y. Supp. 501. See also as to the rules stated in the text, *Kestner v. Pittsburgh & B. Traction Co.*, 158 Pa. St. 422, 27 Atl. 1048; *Dallas Rapid T. R. Co. v. Dunlap*, 7 Tex. Civ. App. 471, 26 S. W. 877; *Dallas Rapid T. R. Co. v. Elliott*, 7 Tex. Civ. App. 216, 26 S. W. 455; *Calumet Elec. St. R. Co. v. Lewis*, 168 Ill. 249, 48 N. E. 153; *Hart v. Cedar Rapids & M. C. R. Co.*, 109 Iowa 631, 80 N. W. 662; *Ehrman v. Nassau Elec. R.*

a vigilant watch for all persons, especially children, either on or approaching the track, and on the first appearance of danger to them to use reasonable efforts to avoid injuring them, is negligence, rendering the company liable independently of a city ordinance enjoining such duty on street car drivers.<sup>12</sup> So, where a boy of seven or eight years was struck by a car while standing on a track waiting for a car to pass on another track, it was held that the motorman in exercising the required care either saw or should have seen the boy, and that he was guilty of negligence in not ringing the bell or sounding the gong.<sup>13</sup> Street railway companies are guilty of negligence if they fail to give warning by sounding a bell, or otherwise, on their approach to a public street crossing.<sup>14</sup> Where a motorman of a car has a clear and unobstructed view of a wagon on the track, and fails to give warning of the car's approach to the wagon, he is negligent, though the place of the accident was not at a street crossing.<sup>15</sup> Before running forward at such speed that he will be likely to strike a team driving along beside the track, he should give a warning signal, unless he has good reason to believe that the occupants of the wagon are aware of the approach of the car.<sup>16</sup> But where a person was

Co., 23 App. Div. (N. Y.) 21, 48 N. Y. Supp. 379; *Martin v. Third Ave. R. Co.*, 27 App. Div. (N. Y.) 52, 50 N. Y. Supp. 234; *Nugent v. Met. St. Ry. Co.*, 17 App. Div. (N. Y.) 582, 45 N. Y. Supp. 596; *Warren v. Union Ry. Co.*, 46 App. Div. (N. Y.) 517, 61 N. Y. Supp. 1009.

See sections 387-390, *post*, herein, as to rights of company in streets and at street crossings.

**12.** *Senn v. Southern R. Co.*, 108 Mo. 142, 18 S. W. 1007; *Driscoll v. Market St. Cable R. Co.*, 97 Cal. 553, 32 Pac. 591; *Shea v. St. Paul City R. Co.*, 50 Minn. 395, 52 N. W. 902; *Barnes v. Shreveport City R. Co.*, 47 La. Ann. 1218, 17 So. 782.

As to duty towards children and

liability for injuries to them, see sections 408-411, *post*, herein.

**13.** *Wise v. St. Louis Transit Co.*, 198 Mo. 546, 5 St. Ry. Rep. 611, 95 S. W. 898.

**14.** *Canfield v. North Chicago St. R. Co.*, 98 Ill. App. 1; *Adams v. Wilmington N. C. Electric R. Co.*, 3 Penn. (Del.) 512, 52 Atl. 264; *Baxter v. St. Louis Transit Co.*, 198 Mo. 1, 5 St. Ry. Rep. 669, 95 S. W. 856; *Bass' Adm'r v. Norfolk Ry. & L. Co.*, 3 Va. Sup. Ct. Rep. 571, 40 S. E. 100.

As to duty of company at street crossings, see section 388, *post*, herein.

**15.** *Fenner v. Wilkes-Barre & W. V. Traction Co.*, 202 Pa. St. 365, 51 Atl. 1034.

**16.** *Tashjian v. Worcester Consol.*

walking along the track with a companion who informed him that a car was coming and who got off the track in time, it was held that the failure to sound the gong did not render the company liable, and that the plaintiff was guilty of contributory negligence.<sup>17</sup> Employees in charge of a motor car are bound to keep a lookout along its tracks where persons are likely to be found, and if a motorman by having his attention on the street in front of the car could have discovered, in time to stop it, that a child was about to cross the track, or after discovering his danger he failed to give the usual signals to warn him of the car's approach, he was guilty of negligence.<sup>18</sup> The failure of the motorman of a car to see one who, on a clear day, is walking with his back to the approaching car along a narrow passageway, from which passengers board trains, is culpable negligence, where such person is injured by being struck by the car.<sup>19</sup> But it is not, as a matter of law, the duty of the conductor of a street railroad car to observe the track in front of the car and a portion of the track on either side, and a driver of a street car is not chargeable with negligence because his attention is not constantly directed to the front on a portion of the line other than a public crossing, or for his failure to see, in the night-time, and at a poorly lighted place, a boy who fell on the track more than six feet ahead of the car.<sup>20</sup> A street railway company is guilty of negligence in running its cars rapidly over a public crossing in a main street of a populous city, in the evening, without any warning.<sup>21</sup> A motorman is negligent in ap-

St. Ry. Co., 177 Mass. 75, 58 N. E. 281; *Murphy v. Derby St. Ry. Co.*, 73 Conn. 249, 47 Atl. 120; *Devine v. Brooklyn Heights R. Co.*, 34 App. Div. (N. Y.) 248, 54 N. Y. Supp. 626; *Consol. Traction Co. v. Haight*, 59 N. J. L. 577, 37 Atl. 135.

**17.** *Garvick v. United Rys. & Elec. Co.*, 101 Md. 239, 4 St. Ry. Rep. 395, 61 Atl. 138.

**18.** *Baird v. Citizens' R. Co.*, 46 Mo. 265, 48 S. W. 78.

**19.** *Conway v. New Orleans, etc.*,

*R. Co.*, 51 La. Ann. 146, 24 So. 780, 5 Am. Neg. Rep. 354.

**20.** *Macon & I. S. Elec. St. R. Co. v. Holmes*, 103 Ga. 655, 30 S. E. 563, 4 Am. Neg. Rep. 251, 12 Am. & Eng. R. Cas. N. S. 385; *De Ioia v. Met. St. Ry. Co.*, 37 App. Div. (N. Y.) 455, 56 N. Y. Supp. 22.

**21.** *South Covington & C. St. Ry. Co. v. Beatty*, 20 Ky. L. Rep. 1845, 50 S. W. 239, 6 Am. Neg. Rep. 75; *Cincinnati St. R. Co. v. Snell*, 54 Ohio St. 197, 43 N. E. 207, 32 L. R. A.

proaching in the dark, without signals, a private crossing which he knows to be much frequented, rendering the company liable for injuries to a driver in a collision at the crossing, if the latter is free from contributory negligence.<sup>22</sup> It is the duty of a motorman in charge of a car to look ahead, not only on his track to see that the way is clear, but on each side of his track to see that no one is about to get on it, and that there are no conditions or circumstances which would evidently compel persons then in his view, passing along the street, to go upon the track in front of the car.<sup>23</sup> A greater degree of watchfulness on the part of street railroad companies is necessary at street intersections, and when approaching the same, than under other circumstances.<sup>24</sup> But failure of the employees in charge of a street car to keep a proper lookout does not render the company liable for an injury to a person on the track, who was himself guilty of contributory negligence.<sup>25</sup> The exercise of proper care in the management of a street car may in a particular case require some warning to be given to a pedes-

276; *Watson v. Minneapolis St. R. Co.*, 53 Minn. 551, 55 N. W. 742.

**22.** *Duncan v. Union R. Co.*, 39 App. Div. (N. Y.) 497, 57 N. Y. Supp. 326, 6 Am. Neg. Rep. 155.

**23.** *City R. Co. v. Thompson*, 20 Tex. Civ. App. 16, 47 S. W. 1038; *Winters v. Kansas City Cable R. Co.*, 99 Mo. 509, 6 L. R. A. 536, 12 S. W. 652.

**24.** *Wallen v. North Chicago St. R. Co.*, 82 Ill. App. 103. The Texas statute relating to the duty of blowing the whistle or ringing the bell in the operation of railway trains does not apply to street railways, nor is there any statute relating to the duty of those operating street cars to give warning of their approach. *Citizens' R. Co. v. Holmes*, 19 Tex. Civ. App. 266, 46 S. W. 116. But a street railway company is liable for the death of a person killed on its track, with-

out contributory negligence, caused by the negligence of the motorman in failing to keep a watch, and to use proper means of stopping the car after discovering him on the track. *San Antonio St. R. Co. v. Renken*, 15 Tex. Civ. App. 229, 38 S. W. 829.

**25.** *Hot Springs St. R. Co. v. Johnson*, 64 Ark. 420, 42 S. W. 833; *Devine v. Brooklyn Heights R. Co.*, 34 App. Div. (N. Y.) 248, 54 N. Y. Supp. 626, where the rear of plaintiff's wagon was struck by an approaching car while he was driving along the track, and the jury were instructed that the plaintiff had a right to assume that he would be given timely warning of the approach of the car, it was held error, as it gave the jury to understand that if defendant failed to give such warning, plaintiff was absolved from all contributory negligence.

trian, the omission of which will constitute negligence, although there is no statutory duty to give such warning.<sup>26</sup> A driver of a street car is not *per se* guilty of negligence in momentarily looking to the sidewalk to see whether persons standing thereon desire to get upon the car, nor when his attention is momentarily diverted to an important and essential duty requisite to the safety of the passengers.<sup>27</sup> But he is not excused for failure to keep a lookout upon approaching the intersection of two streets in a very busy part of a city, by the fact that his attention is diverted by an attempt to identify another car which he was passing, for the purpose of determining whether it is the car to which he should change, nor because he was engaged in making change for a passenger.<sup>28</sup> The absence of any municipal ordinance requiring the ringing of a bell by the operators of a street cable car line at street crossings, or elsewhere, does not relieve the company from liability for personal injuries sustained by being struck by a car, which could have been prevented, if the gripman had not negligently failed to give his signal upon observing the person injured in a dangerous position.<sup>29</sup> A motorman, on approaching a crossing, where he has reason to suppose that children may be engaged in coasting or other play, must keep watch and sound warning for such children, although their conduct is unlawful.<sup>30</sup> It has not yet been held that it is the duty of a street railroad company to constantly ring its car bells from one end of the route to the other, and one injured in the middle of a block as he attempted to cross the track, about dark, on a foggy evening, when the car was brilliantly lighted and his view of it unobstructed, cannot recover for the injury merely because of the absence of warning of the

**26.** *Schulman v. Houston, W. St. & P. Ferry R. Co.*, 15 Misc. Rep. (N. Y.) 30, 36 N. Y. Supp. 439, 71 St. Rep. (N. Y.) 489.

**27.** *Johnson v. Reading City Pass. R. Co.*, 160 Pa. St. 647, 28 Atl. 100, 34 W. N. C. 203, 40 Am. St. Rep. 752; *Culbertson v. Met. St. R. Co.*, 140 Mo. 35, 36 S. W. 834.

**28.** *Thoresen v. La Crosse City R. Co.*, 87 Wis. 597, 58 N. W. 1051; *Barnes v. Shreveport R. Co.*, 47 La. Ann. 1218, 17 So. 782.

**29.** *Mitchell v. Tacoma R. & M. Co.*, 9 Wash. 120, 37 Pac. 341.

**30.** *Strutzel v. St. Paul City R. Co.*, 47 Minn. 543, 50 N. W. 690, 11 Ry. & Corp. L. J. 132.

approaching car, when the condition of the weather might have prevented the motorman from seeing him.<sup>31</sup> Being alert and having his car well in hand so as to be able to stop it at once, a motorman or gripman, with nothing to warn him, or even suggest to him an impending or possible collision, is not bound to infer the existence of danger from the approach of a wagon upon the other track. It is a very common occurrence for a vehicle to use the other track, and he has the right to suppose that it will not turn off in the middle of a block, but will continue on, and the company is not liable, therefore, for an injury caused by the sudden turning of a truck loaded with lumber upon the adjacent track, so that the projecting ends of the lumber were thrust through the car window.<sup>32</sup> When a driver sees a street car approaching, actionable negligence cannot be predicated on the failure to ring the gong, nor on the dimness of the headlight, or the failure to blow a whistle or ring a bell.<sup>33</sup> One controlling the power and

**31.** *Kuhnen v. Union Ry. Co.*, 10 App. Div. (N. Y.) 195, 41 N. Y. Supp. 774. It is not negligence for a motorman to fail to sound his gong or give other warning upon approaching a pile of lumber lying longitudinally at the side of and close to the track, between two intersecting cross streets, preventing the motorman from seeing one at the end of the pile, or such a one from seeing the car, so as to render the company liable for injuries to a child, *non sui juris*, who was playing at the end of the pile and suddenly ran immediately in front of or against the car, when there is no evidence that children were in the habit of playing at that particular point, or any other circumstance to put the motorman on notice. *Perry v. Macon Consol. St. R. Co.*, 101 Ga. 400, 29 S. E. 304, 10 Am. & Eng. R. Cas. N. S. 819. Nor can a street railway company be charged with negligence for failure to

stop or slacken its speed, or give any signal at a street crossing, where a boy ran suddenly from the nearest sidewalk of the cross street directly in front of the car. *Miller v. Union Trac. Co.*, 198 Pa. St. 659, 48 Atl. 864.

**32.** *Alexander v. Rochester City & B. R. Co.*, 128 N. Y. 13, 38 St. Rep. (N. Y.) 254, 27 N. E. 950; *Elwood v. Chicago City Ry. Co.*, 90 Ill. App. 397, nor where a wagon loaded with pipe was struck by an electric car at night while driving along a street car track, when the car carried a headlight and the gong was sounded just before the collision; *McFarland v. Third Ave. R. Co.*, 29 Misc. Rep. (N. Y.) 121, 60 N. Y. Supp. 273, nor where a person is injured while attempting to drive across a street car track a short distance in front of a car approaching under circumstances which should have made him aware of its being near.

**33.** *Anderson v. Met. St. Ry. Co.*,

movement of a car has a right to presume that a person driving a carriage in front of his approaching car, and who apparently is about to turn upon the track in front of the car, will desist from so doing when he sounds the gong; he is only bound, as an ordinarily careful man, to exercise efforts to stop his car after he sees that his warning is unheeded.<sup>34</sup> Since a street car runs with greater rapidity and momentum than a wagon or an omnibus, greater caution should be taken to avoid collision. It ought to be lighted in the night-time so that its approach can be seen by other travelers; and between twilight and dark, if not lighted, it ought to be run so slowly as to avoid collision, or else give, by some signal, warning of its approach.<sup>35</sup> Where the driver of a wagon was killed as a result of a collision between his wagon and a car at nightfall, and the evidence simply showed that prior to the collision the lights on the car were extinguished by the trolley pole leaving the wire, thus depriving the car of light and power, there was held not to be sufficient evidence of negligence to sustain a recovery.<sup>36</sup>

**§ 381. Duties of motormen, gripmen, and other employees.** — We have already shown, in a previous section, the necessity of watchfulness and of proper signals or warning on the part of those having charge of the operation of street cars.<sup>37</sup> The rule ap-

30 Misc. Rep. (N. Y.) 104, 61 N. Y. Supp. 899; *Williamson v. Met. St. Ry. Co.*, 29 Misc. Rep. (N. Y.) 324, 60 N. Y. Supp. 477; *Donnelly v. Brooklyn City R. Co.*, 109 N. Y. 16, 15 N. E. 733; *Little v. Grand Rapids Street Ry. Co.*, 78 Mich. 205, 44 N. W. 137.

**34.** *Cawley v. La Crosse City R. Co.*, 106 Wis. 239, 82 N. W. 197. See also *Stelk v. McNulta*, 40 C. C. A. 357, 99 Fed. 138; *Hart v. Railway Co.*, 109 Iowa 631, 80 N. W. 662.

**35.** *Rascher v. East Detroit & G. P. Ry. Co.*, 90 Mich. 413, 30 Am. St. Rep. 447, 4 Am. Electl. Cas. 473, 51

N. W. 463; *Vitelli v. Nassau Elec. R. Co.*, 53 App. Div. (N. Y.) 639, 65 N. Y. Supp. 1027; *Kaechele v. Traction Co.*, 15 Pa. Super. Ct. 73; *Stafford v. Chippewa Val. El. R. Co.*, 110 Wis. 331, 85 N. W. 1036; *Johnson v. Hudson R. R. Co.*, 20 N. Y. 65; *Shea v. Potero, etc., Co.*, 44 Cal. 414; *East Memphis City Ry. Co. v. Logue*, 13 Lea (Tenn.) 32, 15 Am. & Eng. R. Cas. 459.

**36.** *Higgins v. St. Louis & Sub. Ry. Co.*, 197 Mo. 300, 5 St. Ry. Rep. 671, 95 S. W. 863.

**37.** See preceding section.

plicable to collisions of a street car with pedestrians or vehicles at the intersection of streets, as deduced from a number of authorities, may be stated to be as follows: At the intersection of two streets a pedestrian or the driver of a vehicle has the right to cross the tracks of a street surface railroad, notwithstanding a car is in sight, provided there is a reasonable opportunity to do so without obstructing the passage of the car unnecessarily; and if, for that purpose, it is necessary for the person having charge of the motive power of the car to check its speed, or even to entirely stop the car for a short period, it is his duty to do so, and the person crossing the track has the right, without being necessarily charged with contributory negligence, to assume that that duty will be performed; the rights of the pedestrian or the driver of the vehicle and of the person in charge of the motive power of such car, under these circumstances, are reciprocal, and each is bound to use equal diligence to avoid a collision.<sup>38</sup> The rights of street cars upon the street being

**38.** *Piercy v. Met. St. Ry. Co.*, 30 Misc. Rep. (N. Y.) 612, 62 N. Y. Supp. 867; *Smith v. Met. St. Ry. Co.*, 7 App. Div. (N. Y.) 253, 40 N. Y. Supp. 148; *Dise v. Met. St. Ry. Co.*, 22 Misc. Rep. (N. Y.) 97, 48 N. Y. Supp. 551; *Kennedy v. Third Ave. R. Co.*, 31 App. Div. (N. Y.) 30, 52 N. Y. Supp. 551; *Duncan v. Union Ry. Co.*, 39 App. Div. (N. Y.) 497, 57 N. Y. Supp. 326; *West Chicago St. R. Co. v. McCallum*, 169 Ill. 240, 48 N. E. 424; affg. 67 Ill. App. 645; *Stanley v. Union Depot R. Co.*, 114 Mo. 606, 21 S. W. 832, 56 Am. & Eng. R. Cas. 561; *Hickman v. Union Depot R. Co.*, 47 Mo. App. 65; *Baltimore Trac. Co. v. Wallace*, 77 Md. 435, 21 Wash. L. Rep. 313, 26 Atl. 518; *Hergert v. Union R. Co.*, 25 App. Div. (N. Y.) 218, 49 N. Y. Supp. 307; *Schoener v. Met. St. Ry. Co.*, 72 App. Div. (N. Y.) 23, 76 N. Y. Supp. 157, the motorman of a street car has the duty of approaching a crossing with

the car under control, the more so where his view of the crossing is obstructed by another car, and he cannot give such obstruction as an excuse for his rapid approach.

**In an action for injuries** received in a collision between a wagon and a street car at a street crossing, the court instructed that it was the duty of defendant's motorman, on approaching the crossing, to have his car under such reasonable control as to be able to avoid colliding with persons using the crossing; that it was his duty to be on the lookout, and to have seen what any ordinarily careful motorman would have seen, but that, if no one was near enough to make a collision probable, he had the right to assume that persons approaching would use ordinary care to avoid a collision; that no mistake in regard to these assumptions would be negligence; and that, if the motorman complied with the law as

superior to the rights of anybody going along the street or crossing it elsewhere than at a crossing, because they must run on the track laid for them, and the convenience of the public who use them requires that they move at a proper rate of speed and be not unduly delayed, those who come upon foot or in vehicles, up and down the street, as pleasure or business calls them, and who cross the street backward and forward as their convenience or business incline them to do so, must not needlessly, recklessly, or wilfully obstruct the street cars in their route, and must use reasonable means to keep out of their way. They are not, however, called upon to avoid the use of the street, or to delay crossing it, because a street car happens to be in sight coming toward them. The driver of a street car, or person directing its operation, on the other hand, while he has this superior, but not exclusive, right, and it is not lawful to obstruct his passage unnecessarily, in view of the fact that it is necessary for people to cross the street on foot, and with trucks and carriages, in the performance of their business, is not permitted to pass along the street at an improper rate of speed, or without paying proper attention to persons and vehicles that happen to be in his way. He is bound to use reasonable care so to regulate the passage of his car as not unnecessarily to collide

charged, he was not guilty of negligence, unless he was running his car at an excessive rate of speed, so that he could not stop when danger became apparent. *Held*, not erroneous as placing on defendant the responsibility of an insurer. *Memphis St. Ry. Co. v. Wilson*, 108 Tenn. (24 Pick.) 618, 69 S. W. 265; *Snyder v. People's Ry. Co.*, 4 Penn. (Del.) 145, 53 Atl. 433; *Cox v. Wilmington City R. Co.*, 4 Penn. (Del.) 162, 53 Atl. 569.

**It is the duty of a street railroad company** to exercise reasonable care to avoid injuring persons who have the right to be on the street, and who are neither trespassers nor

licensees as to it. *Norfolk Ry. & L. Co. v. Corletto*, 100 Va. 355, 41 S. E. 740.

**It is the duty of a motorman** to avoid collisions with vehicles traveling upon streets crossing his tracks. *Kerr v. Atlantic Ave. R. Co.*, 10 Misc. Rep. (N. Y.) 264, 30 N. Y. Supp. 1070. It is the duty of a motorman to have his car under control when approaching a crosswalk or cross street, in order to avoid injury to foot passengers and vehicles thereon. *Young v. Atlantic Ave. R. Co.*, 10 Misc. Rep. (N. Y.) 541, 31 N. Y. Supp. 441; *Jones v. Brooklyn Heights R. Co.*, 10 Misc. Rep. (N. Y.) 543, 31 N. Y. Supp. 445; *West Chicago*

with those persons who have occasion to use the street in front of him. It must necessarily occur that street cars will be somewhat interfered with in their passage along the street. The rights of the citizens to use the street necessarily involves such an interference to some extent. This relative right is recognized by the statutes of some of the States, which forbids "persons wilfully obstructing the passage of cars lawfully running on a street railway." Obstructions that are neither careless, reckless, nor wilful are not unlawful and frequently take place. When one attempts to cross the track of a street car and has approached the track at such a distance from an approaching car that he has reasonable ground to suppose that he will be able to cross the track, it is the duty of the street car driver or motorman to give him reasonable opportunity to cross, by checking the speed of his car, or even stopping entirely, if necessary, and otherwise to exercise proper care and precaution to prevent accidents; and whether he is negligent or not in any respect is a question of fact in each case, dependent upon the circumstances.<sup>39</sup> A motorman must keep a reasonably

St. R. Co. v. Allen, 82 Ill. App. 128; Sesselman v. Met. St. Ry. Co., 76 App. Div. (N. Y.) 336, 78 N. Y. Supp. 482.

As to rights and duties at street intersections, see section 388, *post*, herein.

**39.** Lawson v. Met. St. Ry. Co., 40 App. Div. (N. Y.) 312, 57 N. Y. Supp. 997; Brozek v. Steinway R. Co., 10 App. Div. (N. Y.) 360, 41 N. Y. Supp. 1017; Fishback v. Steinway R. Co., 11 App. Div. (N. Y.) 152, 42 N. Y. Supp. 883; Smith v. Met. St. Ry. Co., 7 App. Div. (N. Y.) 253, 40 N. Y. Supp. 148; Kennedy v. Third Ave. R. Co., 31 App. Div. (N. Y.) 30, 52 N. Y. Supp. 551; Schulman v. Houston, W. St. & P. Ferry R. Co., 15 Misc. Rep. (N. Y.) 30, 36 N. Y. Supp. 439; Weiss v. Met. St. Ry. Co., 33 App. Div. (N. Y.) 221, 53 N. Y. Supp. 449; Johnson v. Brooklyn

Heights R. Co., 34 App. Div. (N. Y.) 271, 54 N. Y. Supp. 547; Bossert v. Nassau Elec. R. Co., 40 App. Div. (N. Y.) 144, 57 N. Y. Supp. 896; McFarland v. Third Ave. R. Co., 29 Misc. Rep. (N. Y.) 121, 60 N. Y. Supp. 273; Sickler v. North Jersey St. R. Co., (N. J.) 46 Atl. 779, where, when plaintiff drove onto defendant's track, its car was several hundred feet away, and nothing prevented the motorman from seeing him though the track was slippery, a verdict in his favor for injuries sustained in a collision with the car will not be set aside; Wilson v. Memphis St. Ry. Co., 105 Tenn. 74, 58 S. W. 334; Highland Ave. & B. R. Co. v. South, 112 Ala. 642, 20 So. 1003, a street railroad company is liable for personal injuries to third persons from the negligent operation of one of its trains by persons to whom its con-

careful lookout for, and use reasonable precautions to prevent, accident to persons lawfully using the street; the degree of care required varies according to the time, place, and circumstances.<sup>40</sup> But it is error to instruct the jury that it is the duty of both the motorman and conductor in charge of a car to keep a vigilant watch as, the duties of the latter call him inside the car where he cannot keep a watch ahead.<sup>41</sup> It is the duty, not only of the motorman, but of the conductor of the car as well, to exercise ordinary care and prudence in its management to avoid collisions, and this extends not only to the duty of the motorman to see that the front end of the car may pass safely, but also requires the conductor or other person in charge of the car to watch for and avoid obstructions the car may meet at any time before it has entirely passed.<sup>42</sup> Motormen in charge of electric cars are required in the

trol and management had been committed; *Saffer v. Westchester Elec. R. Co.*, 22 Misc. Rep. (N. Y.) 555, 49 N. Y. Supp. 998; *Tarler v. Met. St. Ry. Co.*, 21 Misc. Rep. (N. Y.) 684, 47 N. Y. Supp. 1090, where the space between a standing carriage and the car track is very small, a car driver approaching from the rear without warning is negligent; *O'Leary v. Brockton St. R. Co.*, 177 Mass. 187, 58 N. E. 585; *Horgan v. Jones*, 131 Cal. 521, 63 Pac. 835; *Montgomery v. Johnson*, (Ky.) 22 Ky. L. Rep. 596, 58 S. W. 476; *Knoll v. Third Ave. R. Co.*, 46 App. Div. (N. Y.) 527, 62 N. Y. Supp. 16; *affd.*, 168 N. Y. 592, 60 N. E. 1113; *Ryan v. La Crosse City R. Co.*, 108 Wis. 122, 83 N. W. 770; *Cohen v. Met. St. Ry. Co.*, 71 N. Y. Supp. 268; *Legari v. Union Ry. Co.*, 61 App. Div. (N. Y.) 202, 70 N. Y. Supp. 718, where, if the motorman had been attending to his business, he could have saved a boy crossing the track.

Where a railway is built in a street so as to be incorporated with and be-

come a part of the roadbed, the public has the right to use it, being careful to look for and avoid approaching cars; and in view of this right in the public, operatives of trains and cars on such railway are under a duty to keep a lookout for persons exercising it. But where the railway is not thus incorporated with the street, the public has no right to use it. *Birmingham Ry., L. & P. Co. v. Jones*, 153 Ala. 157, 6 St. Ry. Rep. 235, 45 So. 177.

**40.** *Austin v. Vicksburg Traction Co.*, (Miss.) 6 St. Ry. Rep. 479, 50 So. 632.

**41.** *Wallack v. St. Louis Transit Co.*, 123 Mo. App. 160, 5 St. Ry. Rep. 689, 100 S. W. 496; *Gebhardt v. St. Louis Transit Co.*, 97 Mo. App. 373, 71 S. W. 448; *Heinzle v. Metropolitan St. Ry. Co.*, 182 Mo. 528, 3 St. Ry. Rep. 521, 81 S. W. 848.

**42.** *Martin v. Interurban St. Ry. Co.*, 84 N. Y. Supp. 921; *Suse v. Met. St. Ry. Co.*, 80 App. Div. (N. Y.) 24, 80 N. Y. Supp. 513.

exercise of ordinary care to keep a proper lookout as to the tracks and the streets upon which the cars are operated to avoid collision with persons and vehicles on the street. In addition to his duty of operating and managing the car, and keeping a proper lookout along the track, he must observe the streets adjacent to the track sufficiently to enable him to ascertain whether persons are approaching or are about to approach the track, and, if such persons are in danger of being struck by the car, he must do all that an ordinarily careful and prudent motorman would do to avoid doing injury to any such person. "Obviously, these principles require a motorman at a street crossing to exercise greater care than between crossings, and much more care in case of very young children approaching the track unconscious of an approaching car, or being so circumstanced as to suggest a probability of such approach, than in case of adults." <sup>43</sup> Ordinary care on the part of a motor-

**43.** *Glettler v. Sheboygan Light, P. & Ry. Co.*, 130 Wis. 137, 6 St. Ry. Rep. 768, 109 N. W. 973, citing *Forrestal v. Milwaukee, E. R. & L. Co.*, 119 Wis. 495, 2 St. Ry. Rep. 968, 97 N. W. 182; *Anderson v. Minneapolis St. Ry. Co.*, 42 Minn. 490, 44 N. W. 518, 18 Am. St. Rep. 525.

See also *Louisville Ry. Co. v. Edelous' Adm'r*, 29 Ky. L. Rep. 1125, 5 St. Ry. Rep. 334, 96 S. W. 901.

It is clearly the duty of the driver or motorman of a street car, in the exercise of reasonable care under the circumstances, to keep a constant lookout, not only ahead of his car, but also to the right and left thereof, so that he may discover persons upon the track and persons approaching it in dangerous proximity to the approaching car. And where the conditions are such that the motorman cannot by keeping a constant lookout discover the near approach of persons, he should use his sense of hearing to avoid collisions with or injury to

them. *Engvall v. Des Moines City Ry. Co.*, (Iowa) 6 St. Ry. Rep. 440, 121 N. W. 12, citing *Doran v. Railroad*, 117 Iowa 442, 9 N. W. 815; *Barry v. Railroad*, 119 Iowa 62, 93 N. W. 68, 95 N. W. 229; *Doherty v. Railway Co.*, 137 Iowa 358, 114 N. W. 183.

It is the duty of a motorman, from the time and immediately before the car starts, until it comes to a stop, to be constantly on the lookout for persons and vehicles on the track, or so near thereto as to be in danger of being injured by the car. *Louisville Ry. Co. v. Johnson's Adm'r*, (Ky.) 6 St. Ry. Rep. 706, 115 S. W. 207.

**It is the common-law duty** of a motorman, running a street car in a populous town or city, to keep a lookout for persons rightfully on the track and liable to be run over by the cars. *Birmingham Ry., L. & P. Co. v. Jones*, 153 Ala. 157, 6 St. Ry. Rep. 235, 45 So. 177.

**Where company has posted**

man means that degree of care which men of ordinary prudence and skill engaged in like work would exercise under similar circumstances; while ordinary care on the part of a driver means that degree of care which a man of ordinary prudence, driving a wagon engaged in like work and under the same or similar circumstances, usually exercises for his own safety.<sup>44</sup> Trolley cars should at all times be kept so under control as not to expose others to un-

**sign "run slow."**—In an action against a street railway company for injuries received by a foot passenger struck by a car of the defendant while crossing a public street, it was established that when and where the accident occurred there was a sign, placed over the tracks by the defendant corporation, requiring cars to "run slow." *Held*, that this requirement, adopted by the defendant corporation previous to the accident, for the guidance of its servants in matters relating to the safety of the public, and made public, created a duty as to such persons as would be likely to be injured by a failure to observe the precautions prescribed. Proof of a violation of such requirement by the motorman, directly resulting in injury to the plaintiff, is evidence, although not conclusive, from which the jury would be warranted in finding the motorman negligent and the defendant therefore liable. *Hayward v. North Jersey St. Ry. Co.*, 74 N. J. L. 678, 6 St. Ry. Rep. 142, 65 Atl. 737. The court said: "Furthermore, we have the fact, and undisputed, that when and where the accident occurred there was, and for some time previously had been, over the tracks a public sign of the defendant company requiring the cars to "Run Slow!" This requirement, adopted and made public by the defendant

corporation previous to the accident, for the guidance of its servants in matters relating to the safety of the public, created a duty of obedience as between the employees and the company, and disobedience of the order by the servant is negligence as between the employer and the servant. If such disobedience injuriously affects a third person it is not to be assumed, in favor of the master, that the negligence was immaterial to the injured person, and that his rights were not affected by it. Rather ought it to be held, as an implication, that there was a breach of duty towards the party injured, as well as towards the master who prescribed the conduct that he thought was necessary or desirable for protection in such cases. The rule is thus formulated, the principle ably discussed, and the authorities marshaled by Chief Justice KNOWLTON, in *Stevens v. Boston Elec. Ry. Co.*, 2 St. Ry. Rep. 435, 184 Mass. 476, 69 N. E. 338. As against the company defendant, the methods which it has adopted for the protection of others are some evidence of what the company deems necessary or proper to insure their safety." *Per DILL, J.*

44. *Keefe v. Seattle Electric Co.*, (Wash.) 6 St. Ry. Rep. 434, 104 Pac. 774.

reasonable hazard, and if a motorman becomes aware that the driver of a team is not going to get off the track, it is the motorman's duty to do what he reasonably can to avoid a collision.<sup>45</sup> And it is the duty of the motorman to use the highest degree of care to avoid injury to a person in danger after discovering his peril.<sup>46</sup> If, however, under all attendant circumstances, those in control of the movement of a car have no reason to apprehend that there may likely be a human being on the track, they are under no duty to one who in fact may be there, until they have actually discovered his presence.<sup>47</sup> A street railway company is bound to operate its cars with reference to that which may be reasonably expected, but it is not obliged to be on guard against that which is not reasonably to be expected, or against the unreasonable conduct of persons on the street, and in case of an accident, as to whether or not it did its duty, is to be determined, in part, by that which it knew of the nature of the place of the accident, and of the number of people, adults and children, making use of the street where such accident occurred.<sup>48</sup> Where, in the case presented for decision, the evidence leaves no room for doubt that the motorman did all that the most competent motorman could have been expected to do to avert the accident, the question whether, under

**45.** *Carroll v. Connecticut Co.*, 82 Conn. 513, 6 St. Ry. Rep. 354, 74 Atl. 897, citing *Currie v. Consolidated Ry. Co.*, 81 Conn. 383, 386, 71 Atl. 356.

**46.** *Louisville R. Co. v. Blaydes*, 21 Ky. L. Rep. 668, 52 S. W. 960; *Warren v. Manchester St. Ry. Co.*, 70 N. H. 352, 47 Atl. 735; *Wills v. Ashland Light & Power & St. Ry. Co.*, 108 Wis. 255, 84 N. W. 998, where the motorman, who was inexperienced, saw a boy near the track, but did not sound the gong or check the speed of the car, though the boy was constantly nearing the track; *Manor v. Bay Cities Consol. R. Co.*, 118 Mich. 1, 76 N. W. 139, 5 Detroit Leg. N. 420; *Gutierrez v. Larrago Elec. Ry. Co.*,

(Tex.) 45 S. W. 310; *Moore v. Charlotte El. St. R. Co.*, 128 N. C. 455, 39 S. E. 57; *Toledo El. St. R. Co. v. Westenhuber*, 22 Ohio C. C. 67, 12 O. C. D. 22; *Giraldo v. Coney Island & B. R. Co.*, 42 St. Rep. (N. Y.) 915, 16 N. Y. Supp. 774.

**47.** *Birmingham Ry., L. & P. Co. v. Jones*, 153 Ala. 157, 6 St. Ry. Rep. 235, 45 So. 177.

**48.** *Chicago City Ry. Co. v. Biederman*, 102 Ill. App. 617; *West Chicago St. R. Co. v. Callow*, 102 Ill. App. 323. It is not negligence in itself to run a street car in the opposite direction from which it is usually run, but is negligent under some circumstances. *North Chicago St. R.*

other circumstances, he would have done as much, or by reason of his youth and alleged inexperience would have been unequal to an emergency with which he might have been confronted, becomes irrelevant.<sup>49</sup> And the facts that the motorman did not continuously observe decedent while crossing the street, that he failed to give any warning or to attempt more promptly to stop the car, do not charge the company with negligence in retaining an incompetent servant without further proof of previous misconduct.<sup>50</sup>

**§ 382. Duties of motormen, gripmen, and other employees — Application of rules.** — Where the speed of a car is not unreasonable, and the motorman spares no effort to check it so as to avoid collision with a person, who, while proceeding near the track, suddenly attempts to cross in front of the car, the company is not negligent.<sup>51</sup> And where the fact that a person approaching a street railway track is unconscious of his danger does not become apparent until too late to stop the car and avoid an accident, the motorman is not negligent in failing to stop, he having sounded the gong and slackened the speed of the car on first seeing the person approaching.<sup>52</sup> Where a motorman in a sudden emergency uses his best judgment to extricate a person, who has been run

Co. v. Irwin, 82 Ill. App. 146; Kessock v. Consol. Trac. Co., 15 Pa. Super. Ct. 103.

**49.** Cloud v. Alexander Electric Rys. Co., 121 La. 1061, 6 St. Ry. Rep. 303, 46 So. 1017.

**50.** Moran v. Milford & U. St. Ry. Co., 193 Mass. 52, 5 St. Ry. Rep. 443, 78 N. E. 736.

**51.** Sauers v. Union Trac. Co., 193 Pa. St. 602, 44 Atl. 917; Jacksonville v. Lamb, 86 Ill. App. 487; Rice v. Crescent City R. Co., 51 La. Ann. 108, 24 So. 791; Gould v. Union Trac. Co., 190 Pa. St. 198, 42 Atl. 477; Wilson v. Memphis St. Ry. Co., 105 Tenn. 74, 58 S. W. 334; Harmon v. Pennsylvania Traction Co., 20 Pa. St. 311, 49 Atl. 755; Kessler v. Citizens' St.

R. Co., 20 Ind. App. 427, 50 N. E. 891; Phillips v. People's Pass. R. Co., 190 Pa. St. 222, 42 Atl. 686, 43 W. N. C. 531, 5 Am. Neg. Rep. 719; Siek v. Toledo, etc., R. Co., 16 Ohio C. C. 393, 9 O. C. D. 51; De Lon v. Kokomo City St. R. Co., 22 Ind. App. 377, 1 Rep. 1050, 49 Cent. L. J. 7, 53 N. E. 847.

See sections 388, 389, 408-410, *post*, herein, as to persons crossing tracks.

**52.** Farrar v. New Orleans & C. R. Co., 52 La. Ann. 417, 26 So. 995; Stelk v. McNulta, (Ill.) 40 C. C. A. 357, 99 Fed. 138, nor was he negligent where he saw a person lying on the track as soon as it was possible from his position and at once did all he could to stop the car; Murray v.

down and is under the car, but his actions result in further injury, he is not liable therefor.<sup>53</sup> Seeing a person driving along the street, parallel to the track, as though he had no intention of crossing it, he is not guilty of negligence because he did not anticipate that such person would suddenly turn across the track in the middle of a block.<sup>54</sup> But if he sees the driver of a wagon in front of him, does not look back, nor pay any attention to the ringing of the bell, nor increase his rate of speed, nor attempt to leave the track, it is his duty to bring his car under control and even to stop, if necessary, to avoid collision.<sup>55</sup> It is the duty of a motorman to slacken the speed of his car so as to avoid a collision if it is apparent to him that a driver has miscalculated the distance or has supposed that the car was traveling at a legal rate of speed, when, in fact, it was traveling faster.<sup>56</sup> He is not free from negligence in failing to stop his car at once upon seeing the wheels of a heavily loaded wagon in front of the car slip on the track while the driver is attempting to get out of his way, or in increasing the speed of his car, after having it under full control, when a few feet behind a wagon loaded with bales, so close to the track as to be rubbed by the car in passing.<sup>57</sup> A motorman, who undertakes to clear the tracks at an upgrade by pushing a heavily loaded wagon with his car, is so far acting within the scope of his employment that his failure to exercise reasonable care renders the company liable for injury to the wagon and team resulting therefrom.<sup>58</sup> He has the

Forty-Second St., M. & St. N. Ave. R. Co., 9 App. Div. (N. Y.) 610, 41 N. Y. Supp. 620.

**53.** Trussell v. Union Trac. Co., (Pa.) 31 Pittsb. L. J. N. S. 15.

**54.** Davidson v. Denver Tramway Co., 4 Colo. App. 283, 35 Pac. 920; Christensen v. Union Trunk Line, 6 Wash. 75, 32 Pac. 1018.

**55.** Sears v. Seattle Consol. St. R. Co., 6 Wash. 227, 4 Am. Electl. Cas. 423, 33 Pac. 389, 1081; Hicks v. Citizens' R. Co., 124 Mo. 115, 27 S. W. 542, 25 L. R. A. 508.

**56.** Birmingham Ry., L. & P. Co.

v. McLain, (Ala.) 6 St. Ry. Rep. 470, 50 So. 149.

**57.** Bush v. St. Joseph & B. H. St. Ry. Co., 113 Mich. 513, 71 N. W. 851, 4 Detroit Leg. N. 377; Blakeslee v. Consol. St. R. Co., 112 Mich. 65, 70 N. W. 408, 29 Chic. Leg. N. 257, 3 Detroit Leg. N. 844; Davidson v. Schuylkill Trac. Co., 4 Pa. Super. Ct. 86; Will v. West Side R. Co., 84 Mo. 42, 54 N. W. 30.

**58.** Chapman v. Public Service Ry. Co., (N. J. L.) 6 St. Ry. Rep. 558, 72 Atl. 36.

right to assume that one walking along the side of the track will exercise the caution which a person of ordinary prudence would exercise, and will not attempt to cross the track immediately in front of the car, until there is reasonable ground for concluding that he may do so, and that one standing upon the track and apparently capable of taking care of himself will step out of the way in time to avoid the car, in the absence of anything to indicate that he does not hear the signals, although in fact he is deaf.<sup>59</sup> Where a street car overtook and collided with an automobile upon a dark and foggy night, it was for the jury to say whether the motorman should have seen the automobile soon enough to avoid the accident, and whether he was negligent, either as to the speed of the car, or as to his failure to ring a bell.<sup>60</sup> The use of a brake by a motorman to stop an electric car in an emergency, instead of the use of the particular appliance used to govern electrical motive power, is not negligence; nor is the company responsible

**59.** *Beem v. Tama & T. Electric Railway & Light Co.*, 104 Iowa 563, 73 N. W. 1045, 10 Am. & Eng. R. Cas. N. S. 610; *Lyons v. Bay Cities Consol. R. Co.*, 115 Mich. 114, 73 N. W. 139, 4 Detroit Leg. N. 797; *Doyle v. West End St. R. Co.*, 161 Mass. 533, 37 N. E. 741; *McKeown v. Cincinnati St. R. Co.*, 2 Ohio Leg. N. 388; *Daly v. Detroit Citizens' R. Co.*, 105 Mich. 193, 63 N. W. 73; *O'Rourke v. New Orleans City & L. R. Co.*, 51 La. Ann. 755, 25 So. 323; *Schulte v. New Orleans City & L. R. Co.*, 44 La. Ann. 509, 10 So. 811; *Houston City St. R. Co. v. Farrell*, (Tex.) 27 S. W. 942; *Houston City St. R. Co. v. Woodlock*, (Tex.) 29 S. W. 817; *Sonnenfeld Millinery Co. v. People's R. Co.*, 59 Mo. App. 668; *Citizens' St. R. Co. v. Shepherd*, 107 Tenn. 444, 64 S. W. 710; *Tishacek v. Milwaukee Electric Railway & Light Co.*, 110 Wis. 417, 85 N. W. 971, a motorman was not negligent where it appeared

that when sixty feet from a street crossing he saw a child about twelve feet from the track starting to cross, and applied the brakes and sounded the gong; the child moved forward looking at the car and stopped about three feet from the track and the motorman then released his brake; when within about six feet of the crossing the child suddenly started to cross and was run over and killed; *McClelland v. Chippewa Val. Ry. Co.*, 110 Wis. 326, 85 N. W. 1018; *Bedell v. Detroit, Y. & A. A. Ry. Co.*, 131 Mich. 668, 92 N. W. 349, 9 Detroit Leg. N. 479, but the company is liable if the motorman was negligent in the management of his car, in view of the position and behavior of the injured party shown to have been seen by the motorman.

**60.** *Baldie v. Tacoma Ry. & P. Co.*, 52 Wash. 75, 6 St. Ry. Rep. 712, 100 Pac. 162.

for the error of judgment of a motorman in reversing the car in a sudden emergency, after a person attempting to cross in front of the car had been struck down; nor for his using more force in handling the brake than was necessary to check the speed of the car. His failure to exercise the best judgment the case renders possible does not establish lack of care and skill upon his part, which renders the company liable.<sup>61</sup> Where children playing in the street suddenly and unexpectedly ran in front of a moving street car, and the motorman could not have reasonably anticipated their action, or that one of them would stumble and fall upon the track, or get caught in the track, the failure of the motorman to anticipate their action or what might happen, or to apprehend that they could not cross in safety, was not negligence, and until their actual peril became known, or in the exercise of ordinary care should have become apparent, to the motorman, it was not his duty to stop the car.<sup>62</sup> But in such cases, and in all cases, the duty of

**61.** *Stabenau v. Atlantic Ave. R. Co.*, 155 N. Y. 511, 50 N. E. 277; *Bittner v. Crosstown St. R. Co.*, 153 N. Y. 76, 46 N. E. 1044; *Wynn v. Central Park N. E. R. Co.*, 133 N. Y. 575, 30 N. E. 721; *Stabenau v. Atlantic Ave. R. Co.*, 15 App. Div. (N. Y.) 408, 44 N. Y. Supp. 36, 6 Am. Electl. Cas. 552; *Lewis v. Long Island R. Co.*, 162 N. Y. 52, 56 N. E. 548; *Bishop v. Bell City R. Co.*, 92 Wis. 139, 65 N. W. 733.

**62.** *Holdridge v. Mendenhall*, 108 Wis. 1, 83 N. W. 1109; *Callary v. Easton Transit Co.*, 185 Pa. St. 176, 39 Atl. 813; *Mulcahy v. Elec. Trac. Co.*, 185 Pa. St. 427, 39 Atl. 1106; *Kierzenkowski v. Phila. Trac. Co.*, 184 Pa. St. 459, 39 Atl. 220, 9 Am. & Eng. R. Cas. N. S. 534; *Mt. Adams & E. P. R. Co. v. Cavagna*, 6 Ohio C. C. 606; *Paducah St. R. Co. v. Adkins*, 14 Ky. L. Rep. 425; *Fenton v. Second Ave. R. Co.*, 126 N. Y. 625, 26 N. E. 967; *Stabenau v. At-*

*lantic Ave. R. Co.*, 155 N. Y. 511, 50 N. E. 277; *Stabenau v. Atlantic Ave. R. Co.*, 15 App. Div. (N. Y.) 408, 6 Am. Electl. Cas. 552, 44 N. Y. Supp. 36; *Campbell v. New Orleans City R. Co.*, 104 La. 183, 28 So. 985; *Fleischman v. Neversink M. R. Co.*, 174 Pa. St. 510, 34 Atl. 119, 6 Am. Electl. Cas. 573; *McLaughlin v. New Orleans & C. R. Co.*, 48 La. Ann. 23, 18 So. 703; *Funk v. Elec. Trac. Co.*, 175 Pa. St. 559, 34 Atl. 861; *Ogier v. Albany R. Co.*, 88 Hun (N. Y.) 486, 34 N. Y. Supp. 867; *Gannon v. New Orleans City R. Co.*, 48 La. Ann. 1002, 20 So. 223; *Calumet Elec. St. R. Co. v. Van Pelt*, 68 Ill. App. 582, 29 Chic. Leg. N. 197, 2 Chic. L. J. Wkly. 110, he is not, however, as matter of law, free from negligence in attempting to run a car past a girl nine years old, who is running away from it toward a part of the street where it is obstructed to within three feet of the track.

the motorman to use ordinary care is not limited to the instant when he might have noticed the plaintiff's danger, without reference to whether he had observed all ordinary care before that time to discover his dangerous position.<sup>63</sup> It is the duty of the motorman to manage his car in a reasonably prudent and careful manner, having in view all the conditions which surround him at the particular place where he may be. It is his duty to keep his car under reasonable control, so that he can stop it promptly if occasion arises for him to do so. And while there must be conceded to vehicles of this kind the right to run at a considerable rate of speed, yet that speed must in all cases be such as is reasonable and safe, in view of the correlative rights of persons upon the streets. The motorman of a street car at all places where circumstances require it, and especially when approaching a crossing in a populous part of a city, is bound to keep a lookout for young children, either approaching the crossing or track, or standing near the track, and to take reasonable precautions, by sounding the gong, and holding the car under control, and stopping it quickly if the child appear upon the track, to avoid a collision.<sup>64</sup>

See sections 408-410, *post*, herein, as to injuries to children.

**63.** *Chicago City Ry. Co. v. Anderson*, 193 Ill. 9, 61 N. E. 999; *Consumers' Electric Light & B. R. Co. v. Pryor*, 44 Fla. 354, 32 So. 797. If it appear that at the time his car ran over and injured a child he was looking at persons assembled at the side of the street, and so failed to see the child in time to prevent the injury, the question of negligence is raised, *Harkins v. Pittsburgh Trac. Co.*, 173 Pa. St. 149, 6 Am. Electl. Cas. 569, 33 Atl. 1044; or, if after seeing a child start from the sidewalk towards the track, twenty-five feet distant, he brought the car nearly to a full stop, and then seeing the child turn back from the track released the brake,

and the child then suddenly turned across the track and was struck by the car, his negligence is a question for the jury, *Woeckner v. Erie Elec. Motor Co.*, 6 Am. Electl. Cas. 581, 176 Pa. St. 451, 35 Atl. 182.

**64.** *Gray v. St. Paul City Ry. Co.*, 87 Minn. 280, 91 N. W. 1106; *Elwood Elec. St. Ry. Co. v. Ross*, 26 Ind. App. 258, 58 N. E. 535; *Schmidt v. St. Louis R. Co.*, 163 Mo. 645, 63 S. W. 834; *Oster v. Schuylkill Trac. Co.*, 195 Pa. St. 320, 45 Atl. 1006; *Fullerton v. Met. St. Ry. Co.*, 63 App. Div. (N. Y.) 1, 71 N. Y. Supp. 326; *Goldstein v. Dry Dock, E. B. & B. R. Co.*, 35 Misc. Rep. (N. Y.) 1, 71 N. Y. Supp. 477; *Griffiths v. Met. St. Ry. Co.*, 63 App. Div. (N. Y.) 86, 71 N. Y. Supp. 406; *San Antonio St. R. Co. v. Mechler*, 87 Tex. 628, 30 S. W.

The driver of a street car, in driving horses attached to such car, must sit or stand on the front platform or place provided for him, maintain control of the horses and car, and exercise a reasonable degree of care and watchfulness to prevent collision and injuries to pedestrians or persons driving on or over such street.<sup>65</sup> It is the duty of a motorman seeing a horse or other vehicle in front of him to so manage and control the speed of the car as to avoid collision.<sup>66</sup> Where a street railway car approaches a street crossing at a steep grade, or where the rails are wet or the view of the railway is obstructed, greater care is required of the motorman than where the approach is at or near the grade of the crossing, or where the rails are in the usual condition, or the view is unobstructed.<sup>67</sup> It is the duty of a motorman during a storm or fog to proceed, not in the usual manner, but cautiously, to insure the safety of others.<sup>68</sup>

**§ 383. Statutes, municipal ordinances, and other regulations —**  
**Generally.** — That a street railway company has direct authority

899; *Wallace v. City & S. R. Co.*, 26 Oreg. 174, 37 Pac. 477, 25 L. R. A. 663; *North Chicago St. R. Co. v. Hoffart*, 82 Ill. App. 539; *Bergen Co. Trac. Co. v. Heitman*, 61 N. J. L. 682, 40 Atl. 651, 11 Am. & Eng. R. Cas. N. S. 286, 4 Am. Neg. Cas. 511; *Rice v. Crescent City R. Co.*, 41 La. Ann. 108, 24 So. 791; *Rack v. Chicago City R. Co.*, 173 Ill. 289, 50 N. E. 668; *Adams v. Met. St. Ry. Co.*, 60 App. Div. (N. Y.) 188, 69 N. Y. Supp. 117; *Gumby v. Met. St. Ry. Co.*, 29 App. Div. (N. Y.) 335, 51 N. Y. Supp. 553; *Kitay v. Brooklyn, Q. C. & S. R. Co.*, 23 App. Div. (N. Y.) 228, 48 N. Y. Supp. 982; *Muller v. Brooklyn Heights R. Co.*, 18 App. Div. (N. Y.) 177, 45 N. Y. Supp. 954; *Nugent v. Met. St. Ry. Co.*, 17 App. Div. (N. Y.) 585, 45 N. Y. Supp. 596; *Adams v. Nassau Elec. R. Co.*, 51 App. Div. (N. Y.) 241, 64 N.

Y. Supp. 818, and under certain circumstances prudence may require the motorman to act upon the assumption that a child is about to attempt to cross in advance of a car, and demand that he so regulate its speed as to avoid running the child down; *Wills v. Ashland Light, Power & St. Ry. Co.*, 108 Wis. 255, 84 N. W. 998; *Chicago City R. Co. v. Tuohy*, 95 Ill. App. 314; *Aiken v. Holyoke St. Ry. Co.*, 180 Mass. 8, 61 N. E. 557.

**65.** *Brooks v. Lincoln Ry. Co.*, 22 Neb. 816, 36 N. W. 529.

**66.** *Wynne v. Atlantic Ave. R. Co.*, 14 Misc. Rep. (N. Y.) 394, 35 N. Y. Supp. 1034; *McConnell v. Atlantic Ave. R. Co.*, 11 Misc. Rep. (N. Y.) 177, 32 N. Y. Supp. 114, 65 St. Rep. (N. Y.) 170.

**67.** *Snyder v. People's Ry. Co.*, 4 Penn. (Del.) 145, 53 Atl. 433.

**68.** *Engelman v. Metropolitan St.*

from the legislature to use the streets of a city does not exempt it from reasonable municipal control.<sup>69</sup> A municipal corporation may make all reasonable regulations for the location and use of electric wires in streets by a street railway company, and may require all reasonable safeguards for the same.<sup>70</sup> Municipal ordinances requiring suitable and seasonable warning to be given of the approach of street railway cars are reasonable and proper regulations, and such ordinances are competent evidence in an action to recover damages alleged to have been sustained by reason of the negligent conduct of the defendant in operating its cars, though the ordinances are not pleaded.<sup>71</sup> And an ordinance providing that a person in charge of a car shall keep a vigilant watch for all vehicles and persons on foot, especially children, on the track or moving towards it, and that on the first appearance of danger the car shall be stopped in the shortest time and space possible, is valid, as it is simply declaratory of the common law.<sup>72</sup> But a statute, municipal or other regulation can never justify negligence. If it be provided that the street car shall at all times be entitled to the track, and any vehicle thereon shall turn out upon its approach so as to leave the track unobstructed, the driver of a car is not justified in running down a person in a sleigh near the track who makes no effort to get out of the way.<sup>73</sup> A municipal ordinance may require a street railroad company to run its cars every six minutes on a specified street, or at certain intervals during certain periods of the day, and it will not be held unreasonable, unless it is clearly made to appear that the action of the council was capricious and arbitrary and that the public convenience did not require cars to run so often.<sup>74</sup> It may also re-

Ry. Co., 133 Mo. App. 514, 6 St. Ry. Rep. 484, 113 S. W. 700.

**69.** Norfolk Ry. & Light Co. v. Corlette, 100 Va. 355, 41 S. E. 740.

See sections 291, 292, *ante*, herein, as to regulations generally.

**70.** State v. Janesville St. R. Co., 87 Wis. 72, 57 N. W. 970, 41 Am. St. Rep. 23, 22 L. R. A. 759.

**71.** Denver City Tramway Co. v. Martin, 44 Colo. 324, 6 St. Ry. Rep. 605, 98 Pac. 836.

**72.** Deschner v. St. Louis & M. R. Co., 200 Mo. 310, 5 St. Ry. Rep. 549, 98 S. W. 737.

**73.** Laethem v. Fort Wayne & B. I. R. Co., 100 Mich. 297, 58 N. W. 996.

**74.** People v. Detroit Citizens' St.

quire a car to come to full stop before a crossing.<sup>75</sup> It may also require both the driver and a conductor to accompany every car.<sup>76</sup> But the adoption of an ordinance prohibiting the running of street cars without vestibules during the winter months is not a valid exercise of the inherent police power of a city, however reasonable such an ordinance may be.<sup>77</sup> A statute imposing a liability for injuries caused by the negligence of a railroad company in erecting and maintaining its poles, although they are erected in compliance with city ordinances and its charter, is not abrogated by the charter of a company creating a lien on all its property prior to any mortgage in favor of the city to secure it against any liability for injury to person and property occasioned by the company's negligence.<sup>78</sup> In New York statutes are in force regulating the starting and stopping of trains, and also as to gates, on elevated railroads,<sup>79</sup> and prohibiting passengers riding on the platforms of cars.<sup>80</sup> Other statutes provide that drivers of carrier's carriage must not leave horses attached thereto, while passengers remain in the same, untied or unsecured;<sup>81</sup> make the carrier liable for the wilful or negligent act of the driver,<sup>82</sup> and provide that carrier must not employ servants in any way connected with the moving power who drink intemperately.<sup>83</sup> If a statute require

R. Co., 116 Mich. 132, 11 Am. & Eng. R. Cas. N. S. 798, 74 N. W. 520, 16 Nat. Corp. Rep. 436, 4 Detroit Leg. N. 1198; Mayor, etc., of New York v. New York & H. R. Co., 10 Misc. Rep. (N. Y.) 417, 31 N. Y. Supp. 147, 63 St. Rep. (N. Y.) 530; City of New York v. Union Ry. Co., 31 Misc. Rep. (N. Y.) 451, 64 N. Y. Supp. 483.

**75.** State, Cape May, D. B. & S. P. R. Co. v. City of Cape May, 59 N. J. L. (30 Vroom) 404, 36 L. R. A. 657, 6 Am. & Eng. R. Cas. N. S. 329, 36 Atl. 678.

**76.** South Covington & C. St. R. Co. v. Berry, 13 Ky. L. Rep. 943, 18 S. W. 1026, 15 L. R. A. 604, 15 Am. & Eng. R. Cas. 434, 6 Am. R. & Corp. Rep. 258.

**77.** City of Yonkers v. Yonkers R. Co., 51 App. Div. (N. Y.) 271, 64 N. Y. Supp. 955.

See section 136, *ante*, herein, as to statutes, etc., as to vestibules.

**78.** Cleveland v. Bangor St. R. Co., 86 Me. 232, 29 Atl. 1005, 11 Am. R. & Corp. Rep. 492, 1 Am. & Eng. R. Cas. N. S. 336.

**79.** N. Y. Laws 1881, chap. 399; Railroad Law 1890, §§ 138, 139.

**80.** N. Y. Laws 1850, chap. 140, § 46; Railroad Law 1890, § 53, amended in 1892.

**81.** N. Y. Rev. Stat. 696, § 5; Highway Law 1890, chap. 568, § 160.

**82.** Id., § 6; id., § 161.

**83.** 1 N. Y. Rev. Stat. 695, § 2; Highway Laws, § 158; Liquor Tax

notice of the time, place, and cause of an injury, occasioned by the negligence of a street railroad company, to be given to the company before action may be maintained thereon, one driving on the highway and injured by the neglect of a street railroad company to repair its road must give such notice.<sup>84</sup> But it has been held that a street railway company which runs down a wagon and throws out and injures one of the occupants is not within a statute requiring notice to be given such companies of injuries "suffered by any person in the management and use of its (the railway's) car tracks," and no notice to the company of the injury is necessary.<sup>85</sup>

**§ 384. Statutes and municipal ordinances as to speed.**—The right of the authorities of a municipal corporation to legislate on the question of speed of street cars only exists by reason of the fact that their police power is called into existence for the protection of individuals and their property when legally using the streets.<sup>86</sup> The ordinance regulating speed must be reasonable so

Laws 1896, chap. 112, § 41. And see Excise Law 1892, chap. 401, § 39; 1857, chap. 628, § 31.

**84.** *Maloney v. Natick & C. St. Ry. Co.*, 173 Mass. 578, 54 N. E. 349.

**85.** *Vincent v. Norton & T. St. Ry. Co.*, 180 Mass. 104, 61 N. E. 822. Where a contract between a city and a street railway company provides that the city shall grant all the licenses, rights, and privileges necessary for the proper and efficient use of electric power to operate cars in the street, and that the company shall keep the track free from ice and snow, and the city may, at its option, remove the whole or such part of ice and snow from curb to curb as it may see fit from any street or part of street in which cars are running, including the snow from the roofs of houses, thrown or falling into the streets, and that removed from the

sidewalks into the streets with the consent of the city, and the company shall be held to pay half the cost thereof, the company is bound to keep its tracks clear from ice and snow, but not to remove or cause to be removed from the streets the snow so cleared from its tracks, and it may, without the permission of the city council, use electric sweepers, rotary brushes, or other similar apparatus to clear the snow from its tracks. *City of Montreal v. Montreal St. R. Co.*, Rap. Jud. Quebec, 19 C. S. 504.

**86.** *Lewis v. Cincinnati St. Ry. Co.*, 10 Ohio S. & C. P. Dec. 53; *Ex p. Terrell*, 40 Tex. Cr. R. 28. An ordinance requiring motormen to stop street cars and ring the bell five feet from the intersection of the street car track with a steam railway track is reasonable on its face and will not be held invalid, as unreasonable, indefi-

as not to unnecessarily interfere with the exercise by the railway company of its franchise.<sup>87</sup> Where at the time of acquiring a franchise for the operation of a street railway in a city street an ordinance exists prescribing the rate of speed, the street railway company is bound by such ordinance and required to comply with its provisions.<sup>88</sup> And the fact that a fine is also imposed for a violation of such an ordinance does not affect the company's liability.<sup>89</sup> The fact that a street car is operated at a dangerous rate of speed does not relieve the person injured in a collision from his liability for his own negligence.<sup>90</sup> If a municipal ordinance be inconsistent with itself, fixing eight miles an hour as the maximum speed for street cars, and also requiring street rail-

nite; and uncertain, without pleading or proving facts showing it so. *Gulf, C. & S. F. Ry. Co. v. Holt*, 70 S. W. 591, 30 Tex. Civ. App. 330.

See section 144, *note*, herein, as to regulations as to speed.

**87.** *Cape May, D. B. & S. P. R. Co. v. City of Cape May*, 59 N. J. L. 393, 6 Am. Electl. Cas. 42, 36 Atl. 679, 36 L. R. A. 656; *Consol. Trac. Co. v. City of Elizabeth*, 58 N. J. L. 619, 34 Atl. 146; *Trenton Horse Ry. Co. v. City of Trenton*, 53 N. J. L. 132, 20 Atl. 1076; *Halsey v. City of Newark*, 54 N. J. L. 102, 23 Atl. 284; *Gray v. St. Paul City Ry. Co.*, 87 Minn. 280, 91 N. W. 1106.

**88.** *Chouquette v. Southern Elec. Ry. Co.*, 152 Mo. 257, 53 S. W. 897. The New Hampshire statute, providing that no person shall ride through any street in a compact part of any town at a swifter pace than at the rate of five miles an hour, applies to a street railroad company whose charter provides that the road may be operated by such power as may be authorized by the mayor and aldermen, who have the power to make such regulations as to the rate of

speed as the public safety and convenience require, where no regulations have been made by them in regard to speed. *Bly v. Nassau St. R. Co.*, 67 N. H. 474, 30 L. R. A. 303, 32 Atl. 764. An ordinance which provides that street cars "shall be drawn by horses or mules only, at a speed not exceeding the rate of seven miles per hour," is not repealed by implication, or superseded, by a subsequent ordinance which authorizes the use of electricity as motive power, and provides that the street car company shall comply with all ordinances "not in conflict herewith, which shall have been at any time heretofore or may at any time hereafter be proposed relating to the rate of speed," etc. *Martineau v. Rochester Ry. Co.*, 81 Hun (N. Y.) 253, 62 St. Rep. (N. Y.) 722, 30 N. Y. Supp. 778.

**89.** *Fath v. Tower Grove & L. Ry. Co.*, 105 Mo. 537, 16 S. W. 913; *Senn v. Southern Ry. Co.*, 108 Mo. 142, 18 S. W. 1007.

**90.** *Moore v. Lindell Ry. Co.*, 1 St. Ry. Rep. 492, and notes 176 Mo. 528, 75 S. W. 672; *Tesch v. Milwaukee Elev. Ry. Co.*, 108 Wis. 593, 84 N.

road companies to operate their cars according to the provisions of their charters, a company whose franchise provides that its cars may be run at a speed greater than eight miles an hour is entitled to so run them, since the franchise must be considered as a part of the charter.<sup>91</sup> Where a statute provides that local authorities are authorized to make such reasonable regulations and ordinances as to the rate of speed within their boundaries as the interests or convenience of the public may require, and a city charter gives the common council power to enact ordinances to regulate the speed of street cars, such an ordinance must be reasonable, and one limiting the speed to only six miles an hour in the city streets is unreasonable and void.<sup>92</sup>

**§ 385. Who liable for injuries.**—The liability of a city for neglect of its duty to exercise care and supervision over electric wires suspended over its streets is not lessened by the fact that individuals or corporations are subjected to a like duty and liability.<sup>93</sup> And the municipality may be negligent when the railroad company in the operation of its cars and the use of its electric wires or cables is free from fault; for example, where a city, having in use a derrick on the same street as defendant's car line, had a cable attached to the derrick, and extending across defendant's track to the engine by which the derrick was operated. When the cable was tightly stretched, it was at an elevation above the car track sufficient to allow the cars to pass under it, and the city had a flagman to give warning when it was dangerous to pass under the cable, and to signal the defendant's motorman when it was safe to go forward; but in passing under the cable the conductor lowered the trolley pole, so as to prevent the pole coming in contact with the cable. Under these circumstances, one of defendant's cars being signaled by the city's flagman to proceed, the motorman obeyed the signal, and the base of the trolley pole

W. 823; *Blate v. Third Ave. R. Co.*, 44 App. Div. (N. Y.) 163, 60 N. Y. Supp. 732.

**91.** *Ruschenberg v. Southern Elec. R. Co.*, 161 Mo. 70, 61 S. W. 626.

**92.** *Union Traction Co. v. City of Watervliet*, 35 Misc. Rep. (N. Y.) 392, 71 N. Y. Supp. 977.

**93.** *Mooney v. Luzerne*, 186 Pa. St. 161, 40 Atl. 311.

caught the cable, and dragged the derrick over, causing it to fall upon plaintiff's intestate, and killing him. In an action against the street car company to recover for the loss occasioned, it was held that it was the duty of the city to keep the cable stretched so defendant's cars could pass under it, and, if the accident occurred by reason of the cable being slack when it ought to have been taut, or because of the city's flagman signaling the motorman to proceed when there was danger, the negligence was that of the city, and not that of the railway company.<sup>94</sup> Where a street car, from which plaintiff had alighted at a turntable, was so negligently turned before plaintiff could move a safe distance away that it struck and injured her, the city's permission to locate the turntable so that a part of a car turning would pass over the sidewalk, did not render the city liable, as the accident would have happened had the location been such that the car would turn wholly between the curbs.<sup>95</sup> Where a railway is being operated solely by a lessee, who is in no way a partner or agent of the lessor, the latter is not liable for negligence of an employee of the former.<sup>96</sup> Where the defendant contended that the court should have granted a motion to direct a verdict in its favor on the ground that the evidence failed to show that it either owned or operated the railroad where the accident happened a car which injured plaintiff, and it appeared that one witness at least spoke of the road and car as those of the defendant, and no one so much as intimated to the contrary,

**94.** *Baltimore Consol. Ry. Co. v. State*, 91 Md. 506, 46 Atl. 1000, holding also that, it not being claimed that the conductor's omission to lower the trolley pole was the cause of the accident, the fact that the conductor was in the forward part of the car, collecting fares, when the accident occurred, instead of being on the rear platform, to lower the trolley pole as the car passed under the cable, was not negligence for which the plaintiff could recover of the railway company. See *Messenger v. St. Pau.*

*City Ry. Co.*, 77 Minn. 34, 79 N. W. 583.

**95.** *Fitch v. City of New York*, 55 N. Y. Super. Ct. 494, the railway company having the right to a turntable in the locality, the city in fixing the place exercises a discretion which is not reviewable by the courts, the sidewalk having no right to freedom from encroachment superior to that of the carriageway.

**96.** *Bensiek v. St. Louis Transit Co.*, 125 Mo. App. 121, 6 St. Ry. Rep. 738, 102 S. W. 587.

it was held that there was no error in the refusal of the court to direct a verdict on this ground.<sup>97</sup>

**§ 386. Joint and several liability.** — In an action for tort, plaintiff may sue any one or more joint tortfeasors, and recover judgment against any one or any number of persons so sued, who are shown to be guilty of the tort alleged.<sup>98</sup> So, if the negligence of another concur with that of a street railroad company in causing an accident, the one injured may maintain an action against the wrongdoers, jointly or severally.<sup>99</sup> In such action it is immaterial which one of the defendants was the more culpable.<sup>1</sup> If it be proved that one of them was not negligent and the other was, the action may be dismissed as to the one, and judgment in favor of the plaintiff may be rendered against the other shown to be negligent.<sup>2</sup> A person contributing to a tort, whether his fellow contributors are men, natural or other forces, or things, is responsible for the whole the same as though he had done it without help.<sup>3</sup> In general, where two or more persons act independently in producing an injury, they are not jointly liable for the combined results of their act, and the fact that it is difficult to determine the relative proportion of injury caused by each is not a sufficient

**97.** *O'Keefe v. United Rys. Co.*, 124 Mo. App. 613, 5 St. Ry. Rep. 666, 101 S. W. 1144.

**98.** *Ross v. Shanley*, 86 Ill. App. 144; *affd.*, 56 N. E. 1105; *Usher v. Van Vranken*, 48 App. Div. (N. Y.) 413, 63 N. Y. Supp. 104.

**99.** *Loudoun v. Eighth Ave. R. Co.*, 162 N. Y. 380, 56 N. E. 983; *Schneider v. Second Ave. R. Co.*, 133 N. Y. 585, 30 N. E. 752; *Tompkins v. Clay St. Ry. Co.*, 66 Cal. 163; *Phila. & R. R. Co. v. Boyer*, 97 Pa. St. 916; *Georgia Pac. Ry. Co. v. Hughes*, 87 Ala. 610, 6 So. 413; *Flaherty v. Northern Pac. R. Co.*, 39 Minn. 328, 40 N. W. 160; *Jackson & S. St. R. Co. v. Simmons*, 107 Tenn. 392,

64 S. W. 705, 23 Am. & Eng. R. Cas. 236; *Rahenkamp v. United Tract. Co.*, 14 Pa. Super. Ct. 635; *West Chicago St. R. Co. v. Horne*, 197 Ill. 250, 64 N. E. 231, an instruction which tells the jury in effect that, unless both of the defendants were guilty of negligence, there can be no recovery against either, is properly refused.

**1.** *Barrett v. Third Ave. R. Co.*, 45 N. Y. 628; *McGary v. West Chicago St. R. Co.*, 85 Ill. App. 610.

**2.** *Schneider v. Second Ave. R. Co.*, 133 N. Y. 583, 30 N. E. 752; *John v. City of Philadelphia*, 19 Pa. Super. Ct. 277.

**3.** *McGary v. West Chicago St. R. Co.*, 85 Ill. App. 610.

reason for holding them jointly liable.<sup>4</sup> Where recovery is had against joint tortfeasors, the judgment creditor is entitled to but one satisfaction. An accord and satisfaction by, or a release or other discharge by the voluntary act of the party injured, of one, of two or more joint tortfeasors, is a discharge of all.<sup>5</sup>

§ 387. **Street cars have a paramount right of way.** — A street railway company has not the exclusive right to the use of its tracks, but it has a paramount right to that of others traveling on the highway and using it, including that portion occupied by the company's tracks, in common, in that portion of the highway taken up by its tracks which is between intersecting streets or street crossings. Its cars have a preference in the streets, and while they must be managed with care so as not to negligently injure persons and property in the streets, pedestrians and persons riding or driving on the highway must use reasonable caution and diligence to keep out of their way, and not unnecessarily obstruct or interfere with their passage. This rule is founded upon the fact that the car is confined to a fixed track and cannot turn out or leave the track, and that the convenience of the individual should be subordinated to the convenience and accommodation of the public.<sup>6</sup>

4. *Magee v. Pennsylvania S. V. R. Co.*, 13 Pa. Super. Ct. 187.

5. *Knickerbocker v. Colver*, 8 Cow. (N. Y.) 111; *Livingston v. Bishop*, 1 Johns. (N. Y.) 290; *Bronson v. Fitzhugh*, 1 Hill (N. Y.) 185; *Ruble v. Turner*, 2 Hen. & M. (Va.) 38.

6. *Rosenblatt v. Brooklyn H. R. Co.*, 26 App. Div. (N. Y.) 600, 50 N. Y. Supp. 333; *McClain v. Brooklyn City R. Co.*, 116 N. Y. 465, 22 N. E. 1062; *Citizens' St. R. Co. v. Howard*, 102 Tenn. 474, 52 S. W. 864; *Central Pass. Ry. Co. v. Chatterton*, 14 Ky. L. Rep. 663; *Fleckenstein v. Dry Dock, E. B. & B. R. Co.*, 105 N. Y. 655, 11 N. E. 951; *Fenton v. Second Ave. R. Co.*, 126 N. Y. 625, 26 N. E. 967; *Ehrisman v. East Har-*

*risburgh City Pass. Ry. Co.*, 24 Atl. 596, 150 Pa. St. 180, 4 Am. Electl. Cas. 486; *Chicago W. D. Ry. Co. v. Ingraham*, 131 Ill. 659, 23 N. E. 350, 41 Am. & Eng. R. Cas. 243; *Rascher v. East Detroit & G. P. Ry. Co.*, 90 Mich. 413, 51 N. W. 463; *Brooks v. Lincoln St. R. Co.*, 22 Neb. 816, 824, 36 N. W. 529; but a street railroad cannot rely on its right of way to the injury of its passengers; *O'Neil v. Dry Dock, E. B. & B. R. Co.*, 129 N. Y. 125, 29 N. E. 84; *Quinn v. Atlantic Ave. R. Co.*, 34 St. Rep. (N. Y.) 801, 12 N. Y. Supp. 223; *Gumb v. Twenty-third St. Ry. Co.*, 53 N. Y. Super. Ct. 466; *Adolph v. Central Park, N. & E. R. Co.*, 76 N. Y. 530; *Adolph v. Central Park, N. & E.*

The street railway company has no exclusive right to occupancy of that portion of the highway on which its tracks are located.

R. Co., 65 N. Y. 554; *Shea v. Potrero & B. V. R. Co.*, 44 Cal. 414; *Rend v. Chicago W. D. Ry. Co.*, 8 Ill. App. 517; *Chicago W. D. Ry. Co. v. Bert*, 69 Ill. 388; *State v. Foley*, 31 Iowa 527; *Hearn v. St. Charles St. Ry. Co.*, 34 La. Ann. 154, 157; *Schwartz v. Crescent City R. Co.*, 30 La. Ann. 15, 18; *Johnson v. Canal St. Ry. Co.*, 27 La. Ann. 53; *Commonwealth v. Temple*, 14 Gray (Mass.) 69; *Commonwealth v. Hicks*, 7 Allen (Mass.) 573; *North Hudson Ry. Co. v. Isley*, 49 N. J. L. 468, 10 Atl. 665; *Orange & Newark H. R. Co. v. Ward*, 47 N. J. L. 560, 4 Atl. 331; *Whitaker v. Eighth Ave. Ry. Co.*, 3 Bosw. (N. Y.) 314, wherein it was held that one who drives a vehicle upon the track of a city railway is bound to use greater care and diligence, than otherwise, to avoid a collision; the company is entitled to the unrestricted use of its track, within the limit of speed allowed by law; *Hegan v. Same*, 15 N. Y. 380, holding that the statute requiring carriages when meeting in the highway to turn to the right, has no application to the meeting of railway cars with common vehicles, in the streets of a city; *Warner v. People's St. Ry. Co.*, 141 Pa. St. 615, 21 Atl. 737; *Toronto St. Ry. Co. v. Dollery*, 12 Ont. App. 679, a person cannot lawfully blockade the tracks by moving a building. *Compare Gulf C. & S. F. Ry. Co. v. Walker*, 70 Tex. 126, 7 S. W. 831, holding that a railroad company operating its road through the streets of a populous city is bound to observe extraordinary precautions for the safety of the public, particularly at street crossings; Gov-

ernment St. R. Co. v. Hanlon, 53 Ala. 70; *Fettrich v. Dickinson*, 22 How. Pr. (N. Y.) 248; *Armstead v. Mendenhall*, 83 Minn. 136, 85 N. W. 929; *Woodland v. North Jersey St. Ry. Co.*, 66 N. J. L. 455, 49 Atl. 479; *Hewlett v. Brooklyn H. R. Co.*, 63 App. Div. (N. Y.) 423, 71 N. Y. Supp. 531. See also *Railroad Co. v. Johnson*, 64 Ark. 420, 42 S. W. 833; *Brown v. Railroad Co.*, 1 Pennew. (Del.) 332, 40 Atl. 936; *Maxwell v. Railroad Co.*, 1 Marv. (Del.) 199, 40 Atl. 945; *Railroad Co. v. Zeiger*, 78 Ill. App. 463; *Moore v. Railroad Co.*, 126 Mo. 265, 29 S. W. 9; *Breary v. Traction Co.*, 5 Pa. Dist. R. 95. See, however, *Laufer v. Traction Co.*, 68 Conn. 475, 37 Atl. 379, 37 L. R. A. 533; *Railroad Co. v. McKewen*, 80 Md. 593, 31 Atl. 797; *Buttelli v. Railroad Co.*, 59 N. J. L. 302, 36 Atl. 700; *Railroad Co. v. Miller*, 59 N. J. L. 423, 36 Atl. 885; *Bresky v. Railroad Co.*, 16 App. Div. (N. Y.) 83, 45 N. Y. Supp. 108; *Railroad Co. v. Renken*, 15 Tex. Civ. App. 229, 38 S. W. 829. The right is exclusive when the car is about to pass, *Siek v. Railway Co.*, 16 Ohio C. C. 393. See *De Lon v. Railway Co.*, 22 Ind. App. 377; *Atlantic Coast Elec. R. Co. v. Rennard*, 62 N. J. L. 773, 42 Atl. 1041; *Hogan v. Railway Co.*, 150 Mo. 36, 51 S. W. 473; *Price v. Charles Warner Co.*, 1 Penn. (Del.) 462; *Wilson v. Railway Co.*, 74 Minn. 436, 77 N. W. 238; *Hot Springs St. R. Co. v. Johnson*, 64 Ark. 64, 42 S. W. 833, holding that other persons must, in case of conflict, yield the right of way to the street cars, and citing *Smith v. Phila. Tract. Co.*, 3 Pa.

Other travelers in vehicles have an equal right to use this, as well as different portions of the way, not only for crossing, but for progressing, subject only to the restriction that they must not unreasonably obstruct the street cars, which by the limitations of their construction and legal rights can proceed only on their rails.<sup>7</sup> Although street cars have a superior right of way to general travel on the streets, at places other than crossings, the general public have the right to use and travel upon the entire street, including that portion of it on which the car tracks are laid, and are in no sense to be treated as trespassers for so doing.<sup>8</sup> No part of a public street is withdrawn from use by placing a street railway track upon it, such street is merely burdened with an additional easement in favor of the street railway company, with the preferential right of passage over it.<sup>9</sup> The right and duty of pedestrians, and the right and duty of the person in charge of the motive power of a street car when crossing streets, are reciprocal, and each is bound to use equal diligence to avoid collision.<sup>10</sup> It is incumbent on a street railway company to use such reasonable care in operating its cars, as to speed, giving signals, and slowing up and stopping the car when danger is imminent, as is demanded by the surrounding circumstances, and persons using the streets are also bound to stop, and, if need be, turn out of the tracks, in the presence of danger.<sup>11</sup> Street railway companies and travelers must each use the street with reasonable regard for the safety and

Super. Ct. 129, 40 W. N. C. 501; *Flewelling v. Lewiston & A. H. R. Co.*, 89 Me. 585, 36 Atl. 1056.

7. *Jeddrey v. Boston & N. St. Ry. Co.*, 198 Mass. 232, 6 St. Ry. Rep. 754, 84 N. E. 316.

See also *Hamlin v. Pacific Elec. Ry. Co.*, 150 Cal. 776, 5 St. Ry. Rep. 52, 89 Pac. 1109.

8. *Swanson v. Chicago City Ry. Co.*, 242 Ill. 388, 6 St. Ry. Rep. 451, 90 N. E. 210.

9. *Spiking v. Consolidated Ry. & P. Co.*, 33 Utah 313, 6 St. Ry. Rep. 320, 93 Pac. 838; *Loofbourow v. Utah*

*Light & Ry. Co.*, 33 Utah 480, 6 St. Ry. Rep. 749, 94 Pac. 981.

10. *Pilmer v. Boise Traction Co.*, 14 Idaho 327, 6 St. Ry. Rep. 514, 95 Pac. 432; *Indianapolis St. Ry. Co. v. Bolin*, 39 Ind. App. 169, 5 St. Ry. Rep. 192, 78 N. E. 210. See *Indianapolis Traction & Term. Co. v. Kidd*, 167 Ind. 402, 5 St. Ry. Rep. 204, 79 N. E. 347.

11. *Snyder v. People's Ry. Co.*, 4 Penn. (Del.) 145, 53 Atl. 433; *Cox v. Wilmington City Ry. Co.*, 4 Penn. (Del.) 162, 53 Atl. 569.

convenience of the other.<sup>12</sup> The proprietor of a street car who runs it over a highway under a franchise from the State has no greater rights as to the manner of the use of that part of the highway on which the car is run than the proprietor of any other vehicle, except that, since it can move only on fixed tracks, it is incumbent on those also traveling upon them to make reasonable efforts to keep out of the way of an approaching car.<sup>13</sup> A street car company does not acquire by its conferred franchise a servitude or right to priority of way upon the highway, as does an ordinary freight or passenger railway company, by gift, voluntary transfer for consideration, or condemnation with compensation, as to land over which it runs its tracks. A street car and a footman or vehicle have equal rights of the same kind to the concurrent use of the city streets. The rights and duties of both are reciprocal and mutual. Each is bound to exercise commensurate care in self-protection and in avoiding harm. Such care on the part of the street car company is differentiated from that of an ordinary user of the street, because its tracks make the side movements of its cars impossible, and because it is authorized to operate heavy cars, with powerful motive force, by reason of which the momentum and inertia of its cars differ from that of ordinary vehicles.<sup>14</sup> A person may lawfully drive along or upon the tracks of an electric street railway, but should not carelessly or wilfully obstruct the cars, and as one approaches should turn off from the track so as to allow it to pass, and in a reasonable manner respect the paramount rights of the corporation; but, on the other hand, the company must recognize his right and not carelessly run him down, but give him the necessary time and reasonable opportunity to move off from the tracks and allow the car to pass.<sup>15</sup> So the mere fact that a street car has a right of way over street car tracks does

**12.** *Austin v. Vicksburg Traction Co.*, (Miss.) 6 St. Ry. Rep. 479, 50 So. 632.

**13.** *Smith v. Connecticut Ry. & L. Co.*, 80 Conn. 268, 6 St. Ry. Rep. 830, 67 Atl. 888.

**14.** *Brewer v. St. Paul City Ry.*

*Co.*, 107 Minn. 326, 6 St. Ry. Rep. 543, 120 N. W. 382.

**15.** *Bernhard v. Rochester R. Co.*, 68 Hun (N. Y.) 369, 51 St. Rep. (N. Y.) 880, 22 N. Y. Supp. 82;

*O'Neill v. Third Ave. R. Co.*, 3 Misc. Rep. (N. Y. C. P.) 521, 52 St. Rep.

not justify a motorman in failing to anticipate that an automobile may be running upon such tracks, because the company has no exclusive right of way in the streets, and its duties are reciprocal with those of the drivers of ordinary vehicles on the street, and when it is apparent that there is a vehicle ahead which cannot be gotten off the tracks in time to avoid collision, the car must be brought to a stop.<sup>16</sup>

§ 388. **Right of way at street crossings.** — A street car has no paramount right of way over other vehicles and pedestrians at the intersections of streets where the car tracks cross other streets than the one they run along. The preference or right of way accorded to street cars upon city streets, especially between street crossings, and in respect to vehicles passing in the same or opposite directions to the cars, within the space embraced within their tracks, does not apply at street crossings, and their rights to the use of the streets at crossings are precisely the same as those of pedestrians and other vehicles crossing their tracks there. Neither has a superior right to the other. The car has a right to cross, and must cross, the street; and a vehicle or pedestrian has the right to cross, and must cross, the railroad track. The right of each must be exercised with due regard to the right of the other, in a reasonable and careful manner, and so as not unreasonably to abridge or interfere with the rights of the other.<sup>17</sup> The

(N. Y.) 486, 23 N. Y. Supp. 20.

16. *Baldie v. Tacoma Ry. & P. Co.*, 52 Wash. 75, 6 St. Ry. Rep. 712, 100 Pac. 162.

17. *O'Neil v. Dry Dock, E. B. & B. R. Co.*, 129 N. Y. 125, 130, 29 N. E. 84, 41 St. Rep. (N. Y.) 107; *Huber v. Nassau Elec. R. Co.*, 22 App. Div. (N. Y.) 426, 48 N. Y. Supp. 38; *Buhrens v. Dry Dock, E. B. & B. R. Co.*, 53 Hun (N. Y.) 571, 6 N. Y. Supp. 224; *affd.*, 125 N. Y. 702, 26 N. E. 752; *Bresky v. Third Ave. R. Co.*, 16 App. Div. (N. Y.)

83, 45 N. Y. Supp. 108; *Zimmerman v. Union Ry. Co.*, 3 App. Div. (N. Y.) 219, 74 St. Rep. (N. Y.) 18, 38 N. Y. Supp. 362; *Chapman v. Atlantic Ave. R. Co.*, 14 Misc. Rep. (N. Y.) 384, 70 St. Rep. (N. Y.) 753, 35 N. Y. Supp. 1045; *Dignan v. Brooklyn City R. Co.*, 14 Misc. Rep. (N. Y.) 388, 70 St. Rep. (N. Y.) 755, 35 N. Y. Supp. 1047; *Shanley v. Union R. Co.*, 14 Misc. Rep. (N. Y.) 442, 70 St. Rep. (N. Y.) 734, 35 N. Y. Supp. 1030; *Hergert v. Union Ry. Co.*, 25 App. Div. (N. Y.) 218, 49 N. Y. Supp. 307; *O'Rourke*

trolley car and the driver may each acquire a right of way to cross at street intersections, though it is suggested that a driver might be negligent though he has a right of way if he persists in crossing when he perceives or ought to perceive that the motorman is not yielding to his just claim.<sup>18</sup> It is incumbent upon a street railway company in operating its cars at public crossings to use ordinary care to avoid injury, and this rule is applicable in thickly-populated or much-used districts regardless of whether or not there is a statute or a municipal ordinance limiting the rate of speed.<sup>19</sup> While a street railway company has a preferential right of way it has no right to proceed upon the assumption that it may take no heed of the probability of encountering vehicles at cross-

v. *Yonkers R. Co.*, 32 App. Div. (N. Y.) 8, 52 N. Y. Supp. 706; *Dise v. Metropolitan St. Ry. Co.*, 22 Misc. Rep. (N. Y.) 97, 48 N. Y. Supp. 551. The rule applies though the opposite street that the vehicle is to enter after crossing the car track is not precisely in a direct line from that which the vehicle leaves to cross, *Brozell v. Steinway Ry. Co.*, 23 App. Div. (N. Y.) 623, 48 N. Y. Supp. 345; *Johnson v. Rochester Ry. Co.*, 70 N. Y. Supp. 113, 116, 61 App. Div. (N. Y.) 12; *Omaha St. R. Co. v. Cameron*, 43 Neb. 297, 61 N. W. 606; *Shelly v. Brunswick Tract. Co.*, 65 N. J. L. 639, 48 Atl. 562; *West Chicago St. R. Co. v. Dedloff*, 92 Ill. App. 547. If a railway car obstruct the crossing of a public street, it is not a wrongful act for a traveler to pass over its platform to avoid the obstruction; he has the right to do so, *Shea v. Sixth Ave. R. Co.*, 62 N. Y. 180, 5 Daly (N. Y.) 221. See note to *Hicks v. Citizens' R. Co.*, 124 Mo. 115, 27 S. W. 115, 25 L. R. A. 508; *Cole v. Central Ry. Co.*, 103 Ill. App. 160, neither vehicle nor street car has the absolute right of way to the exclusion of the other, but their

rights are reciprocal, and each must respect those of the other. *Chicago City Ry. Co. v. Martensen*, 100 Ill. App. 306; *affd.*, 198 Ill. 511, 64 N. E. 1017; *Nashville Ry. Co. v. Norman*, 108 Tenn. 479, 67 S. W. 479; *Reilly v. Brooklyn H. R. Co.*, 65 App. Div. (N. Y.) 453, 72 N. Y. Supp. 1080; *Toledo Elec. St. Ry. Co. v. Westenhuber*, 22 Ohio C. C. 67, 12 O. C. D. 22; *Traver v. Spokane St. Ry. Co.*, 25 Wash. 225, 65 Pac. 284; *Towner v. Brooklyn H. R. Co.*, 44 App. Div. (N. Y.) 628, 60 N. Y. Supp. 289.

18. *Weinburger v. North Jersey Street Railway Co.*, 73 N. J. L. 694, 5 St. Ry. Rep. 711, 64 Atl. 1059.

19. *Wolf v. City Ry. Co.*, 50 Oreg. 64, 6 St. Ry. Rep. 265 91 Pac. 460, wherein it is said: It is incumbent upon a street railway company, in operating its cars at public crossings, to use ordinary care to avoid injury; that is, such a degree of solicitude for the welfare of others as persons of average prudence would exercise, in view of the danger reasonably to be apprehended and of the consequences of accidents resulting

ings. A motorman in approaching crossings must proceed with such care and caution that he can reduce to the minimum the danger to others.<sup>20</sup> A street car should be kept under the reasonable control of the motorman when crossing a street, and persons with or without vehicles, passing over the track at street crossings, may assume that care will be used to reduce the speed at such crossings.<sup>21</sup> The railroad company must recognize and respect the equal rights of all others, and cause its servants who operate the cars to exercise the care which the increased danger arising from the travel at street crossings demand, and others using the street must take all reasonable and proper precaution to avoid accidents.<sup>22</sup> If it is the rule that cars must be under control at street crossings, this control, in the absence of legislative require-

therefrom. Excessive speed at such places augments the danger of collision with travelers.

**20.** *Denver City Tramway Co. v. Martin*, 44 Colo. 324, 6 St. Ry. Rep. 605, 98 Pac. 836. The court said in this case: "It is to be conceded that, while the street railroad company has this preferential right of way, it has no right to proceed upon the assumption that it may take no heed of the probability of encountering at such crossings in a city vehicle and the like, which have the right to use the crossing as a common highway. The motorman in control of the operation of his car must at all times, in approaching such crossings, proceed with such care and caution as, while subserving the public in rapid transit, he can reduce to the minimum the danger to others entitled to its contemporaneous use. The law of Colorado did not undertake to define the rate of speed at which a street car may run. It did exact of the motorman a degree of vigilance commensurate with the probable danger to others using the crossing at that

hour of the night. While the evidence in this case tends to show that at the time of night when this accident occurred this crossing was infrequently used by vehicles, and this fact should be taken into consideration by the jury in determining the question of the motorman's negligence, the fact that vehicles were liable to use the crossing at any time laid upon him the duty of keeping a lookout for their approach, and to so have his car under such control, with the appliances at his command, that he could stop it within a reasonable time to avoid a collision with a vehicle driven with reasonable care."

**21.** *Pilmer v. Boise Traction Co.*, 14 Idaho 327, 6 St. Ry. Rep. 514, 95 Pac. 432.

**22.** *Winters v. Kansas City Cable Ry. Co.*, 99 Mo. 509, 40 Am. & Eng. R. Cas. 261, 12 S. W. 652; *Strutzel v. St. Paul City R. Co.*, 47 Minn. 543, 50 N. W. 690; *McClain v. Brooklyn City R. Co.*, 116 N. Y. 459, 40 Am. & Eng. R. Cas. 254, 22 N. E. 1062, holding that the company "had no right to so occupy the street and use the

ments, must be a reasonable control, depending upon the circumstances, and not an absolute control so that a car may be stopped immediately under all circumstances. If the motorman sees a clear track and has no occasion to stop and no reason to anticipate danger to another, it would not be negligence to maintain the usual rate of speed, even over a crossing. But if he sees, or ought to see, persons or vehicles thereon, not able to get out of his way readily, it would certainly be negligence not to have such control of his car as to be able to stop before reaching such crossing.<sup>23</sup> The general rule is that at a street crossing, or at a place used as a street crossing, the motorman in charge of a car approaching one discharging passengers is bound to keep a sharp lookout for passengers or other persons who may attempt to cross the tracks behind the standing or moving car, to have his car under such control that he can stop it upon the appearance of danger, and to give such signals as will usually protect travelers who are in the exercise of ordinary prudence.<sup>24</sup> Where plaintiff approaches a street crossing toward which a car is approaching, the duty is on the party to stop and avoid a collision who can most easily and readily adjust himself to the exigencies of the case; and, when plaintiff can do so more readily, the motorman has a right to presume that such duty will be performed.<sup>25</sup> A street railway company cannot enforce its right of passage over a public crossing by running its cars over a person who makes a wrongful or negligent use thereof, and is bound to make a reasonable effort to prevent injury to such person after having discovered his danger; but, if the negligence of such person is obvious, and it appears

same with its cars as to make it extremely dangerous to cross the street at all times."

**23.** *Skinner v. Tacoma Ry. & P. Co.*, 46 Wash. 122, 6 St. Ry. Rep. 822, 89 Pac. 488.

**24.** *Bremer v. St. Paul City Ry. Co.*, 107 Minn. 326, 6 St. Ry. Rep. 543, 120 N. W. 382, citing *Louisville City Ry. Co. v. Hudgins*, 5 St. Ry. Rep. 335, 124 Ky. 79, 98 S. W. 275,

7 L. R. A. (N. S.) 152; *Chicago City Ry. Co. v. Robinson*, 127 Ill. 9, 18 N. E. 772, 4 L. R. A. (N. S.) 126, 11 Am. St. Rep. 87; *Cin. St. Ry. Co. v. Whitcomb*, 66 Fed. 915, 14 C. A. 183; *Birmingham Co. v. City Co.*, 119 Ala. 615, 24 So. 558, 72 Am. St. Rep. 955.

**25.** *Helber v. Spokane St. Ry. Co.*, 22 Wash. 319, 61 Pac. 40; *Becker v. Railway Co.*, 121 Mich. 580; *Warren*

that the servants of the company exerted themselves to avoid injury to him after having seen his danger, and injury nevertheless resulted, the injured party cannot recover, although the company was guilty of negligence, through its servants, in having approached the crossing at an undue rate of speed before the danger was discovered. In such case there is concurrent negligence in both parties.<sup>26</sup> The rule of the road in relation to vehicles approaching a street crossing that the first to reach the crossing, traveling at a reasonable rate of speed, has the right to pass over first, applies to fire engines and trucks and trolley cars, in the absence of legislative enactment, municipal regulation or local custom.<sup>27</sup> Where a city ordinance requires the motorman of a street car on approaching a street crossing to sound a gong within sixty feet of the crossing, and the evidence tends to show that the gong was not so sounded, but that the driver of the coach approaching the crossing in fact saw the car more than sixty feet from the crossing, it has been held that the court erred in its charge in directing particular attention to the failure to give the signal as required by ordinance.<sup>28</sup>

**§ 389. Right of way over tracks elsewhere than at street crossings.** — Though the right of a street railroad within its lines to use the street is superior to that of other users of the street and its cars have a superior right of way to the general travel on streets at places other than crossings, to the extent that those traveling by other means must get off the tracks and give way to

*v. Mendenhall*, 77 Minn. 145, 79 N. W. 661; *Fonda v. Railway Co.*, 77 Minn. 336, 79 N. W. 1043.

**26.** *Riedel v. Wheeling Traction Co.*, 63 W. Va. 522, 6 St. Ry. Rep. 491, 61 S. E. 821.

In using such crossings it is incumbent upon both parties to exercise care, and when it is apparent that both have been negligent, and their negligence is concurrent or co-incident, so that the negligence of

neither can be regarded as having been the proximate cause of the injury, no damages can be recovered. *Riedel v. Wheeling Traction Co.*, 63 W. Va. 522, 6 St. Ry. Rep. 491, 61 S. E. 821.

**27.** *Knox v. North Jersey St. Ry. Co.*, 70 N. J. L. 347, 2 St. Ry. Rep. 732, 57 Atl. 423.

**28.** *Denver City Tramway Co. v. Norton*, 141 Fed. 599, 4 St. Ry. Rep. 83, 73 C. C. A. 1.

moving cars, still the general public, in the exercise of due care, have the right to use and travel on the entire street and to cross the tracks as well within the blocks as at street crossings, in which case both the traveler and the railroad company are required to use care, commensurate with the danger, to prevent a collision.<sup>29</sup> A person placing himself or his horse and vehicle on the tracks for any legitimate use of the street cannot, therefore, be treated as a trespasser.<sup>30</sup> The interests of the public require that the cars of a street railroad shall not be unreasonably delayed by the conduct of others using the street, and for this purpose and to this extent the general right of the company over that portion of the street where the tracks lie is superior to that of other persons using the streets.<sup>31</sup> But the rule that the traveler should give the right of way to a street car does not relieve the railway company from exercising due care to prevent a collision, and when persons in charge of a car know, or by the exercise of a reasonable care should know, of the inability of a traveler to prevent a collision, it is their duty to exercise due care to prevent the car from running into him or colliding with his vehicle.<sup>32</sup> An electric car has no exclusive or superior right of way over a horse car at a point where the two car lines intersect. It is the duty of the motorman or

**29.** *Wilman v. People's Ry. Co.*, 4 Penn. (Del.) 260, 55 Atl. 332; *North Chicago St. R. Co. v. Smadraff*, 189 Ill. 155, 59 N. E. 527; affg. 89 Ill. App. 411; *West Chicago St. R. Co. v. Dougherty*, 89 Ill. App. 362, an instruction that all persons and vehicles have an equal right to the use of the streets was erroneous; *Consumers' Electric Light & St. R. Co. v. Pryor*, 44 Fla. 354, 32 So. 797, but have no superior rights in the absence of a specific legislative act. *Adams v. Wilmington & N. C. Electric Ry. Co.*, 3 Penn. (Del.) 512, 52 Atl. 264; *Farley v. Wilmington & N. C. Electric Ry. Co.*, 3 Penn. (Del.) 581, 52 Atl. 543; *Canfield v. N. Chicago St.*

*R. Co.*, 98 Ill. App. 1; *McCracken v. Consol. Tract. Co.*, 201 Pa. St. 378, 50 Atl. 830; *West Chicago St. R. Co. v. Schwartz*, 93 Ill. App. 387.

**30.** *McFarland v. Consol. Tract. Co.*, 204 Pa. St. 423, 54 Atl. 308; *North Chicago St. Ry. Co. v. Smadraff*, 189 Ill. 155, 59 N. E. 527; affg. 89 Ill. App. 441; *Klockenbrink v. St. Louis & M. R. Co.*, 172 Mo. 678, 72 S. W. 900; *Joliet R. Co. v. Barty*, 96 Ill. App. 351.

**31.** *Chicago City Ry. Co. v. Manger*, 105 Ill. App. 579.

**32.** *Danville Ry. & Elec. Co. v. Hodnett*, 101 Va. 361, 43 S. E. 606; *Schafstette v. St. Louis & M. R. Co.*, 1 St. Ry. Rep. 434, and notes, 175

driver of the car last arriving at the intersection to stop and let the other pass.<sup>33</sup>

§ 390. **The law of the road as to the turning to the right.** — The common-law rule, and in many States statutory rule, requiring carriages meeting upon the highway to turn seasonably to the right, when practicable, has no application to the meeting of street railroad cars with common vehicles; and where it appears that a vehicle meeting a car turned to the left instead of the right, and was struck, it has been held that this does not, of itself, constitute negligence on the part of the injured person, and an action for damages, caused by the negligence of the railroad, is maintainable.<sup>34</sup> It is proper to refuse to charge in such a case that, as plaintiff was on the wrong side of the street at the time of the accident, the presumption arises that the collision was due to his fault, since a person has a right to travel on any part of the street, provided he regards the rights of others.<sup>35</sup> The mere fact of a street car running on the left-hand track is not itself a fault on the part of the company sufficient to subject it to damages resulting from an accident.<sup>36</sup> One is not, as matter of law, guilty of

Mo. 142, 74 S. W. 826; *Mertz v. Detroit Elec. Ry. Co.*, 125 Mich. 11, 83 N. W. 1036, 7 Det. Leg. N. 393.

**33.** *Met. R. Co. v. Hammett*, 13 App. (D. C.) 370. Under a statute providing that "at all crossings of the tracks of two street railways, when a car in each road approaches such crossing at substantially the same time, the car on the track first laid shall have precedence and be entitled to the right of way," a street railway company cannot ignore an ordinance requiring a car to come to a full stop before making a crossing, and the car does not have the right of way until it stops in accordance therewith. *Becker v. Detroit Citizens' St. R. Co.*, 121 Mich. 580, 80 N. W. 581.

**34.** *Hegan v. Eighth Ave. R. Co.*,

15 N. Y. 380, the statute refers to cases where there is an equal ability in the carriages which are about to meet, commensurable with the mutual obligation which the statute imposes. *Brown v. Wilmington City Ry. Co.*, 1 Penn. (Del.) 332, 40 Atl. 936, 12 Am. & Eng. R. Cas. N. S. 439. See *Ryberg v. Portland Cable Ry. Co.*, 22 Oreg. 224, 29 Pac. 614; *Spofford v. Harlow*, 3 Allen (Mass.) 176; *State Consol. Tract. Co. v. Reeves*, 58 N. J. L. (29 Vroom) 573, 34 Atl. 128; *Mooney v. Trow Directory P. & B. Co.*, 2 Misc. Rep. (N. Y.) 238, 51 St. Rep. (N. Y.) 418, 21 N. Y. Supp. 957.

**35.** *Spurrier v. Front St. Cable R. Co.*, 3 Wash. 659, 29 Pac. 346. See

**36.** *Altreuter v. Hudson R. R. Co.*, 2 E. D. Smith (N. Y.) 151.

contributory negligence in driving on a street car track, or in turning to the left on seeing the car approach, when it is impossible to turn to the right because of deep piles of snow on that side.<sup>37</sup> A driver proceeding easterly is not guilty of negligence in turning upon the west-bound track of an electric railroad, in order to avoid a car approaching on the east-bound track, the space between the latter track and curb being occupied by a standing wagon, nor continuing upon the west-bound track while the necessity for so doing continues, until such time as it becomes dangerous by reason of an approaching car on the west-bound track.<sup>38</sup> But a statute providing that when vehicles meet, the drivers of each must turn seasonably to the right of the center of the highway, under a penalty, applies to a vehicle being driven on a street car track, which turned out to the left in meeting the car, thereby colliding with a wheelman on the right side of the road.<sup>39</sup> Such a statute does not apply and a driver is not negligent toward a pedestrian struck by the team as he started to cross the street to reach a street car, in driving on the left side of the street.<sup>40</sup> The rule is well established that at intersecting streets, or a practical continuation of a bisecting street, the rights of a street car and of a crossing vehicle are equal, as stated elsewhere, and that the motorman of a street car has no paramount right at a crossing over the rider of a bicycle.<sup>41</sup>

also *Suydam v. Grand St., etc., R. Co.*, 41 Barb. (N. Y.) 375.

**37.** *North Chicago St. R. Co. v. Allen*, 82 Ill. App. 128.

**38.** *Murphy v. Nassau Elec. R. Co.*, 19 App. Div. (N. Y.) 583, 46 N. Y. Supp. 283.

**39.** *Diehl v. Roberts*, 134 Cal. 164, 66 Pac. 202. An express wagon must turn to the right on meeting a bicycle, under a statute which requires vehicles to so turn on meeting. *State v. Collins*, 16 R. I. 371, 3 L. R. A. 394, 17 Atl. 131. The driver of a vehicle, who, to avoid colliding with a passing car, suddenly stopped be-

fore a vehicle which he had just passed, was bound to use the care called for from a man of ordinary intelligence in such a situation, and if, to avoid the car, he chose the chance of escaping the vehicle in the rear, which thereupon unavoidably collided with his own, the driver of the latter is not liable for the resulting injuries. *Mass v. Fauser*, 36 Misc. Rep. (N. Y.) 831, 74 N. Y. Supp. 861.

**40.** *Yore v. Mueller Coal, Heavy Hauling & Transfer Co.*, 147 Mo. 679, 5 Am. Neg. Rep. 630, 49 S. W. 855.

**41.** *Reilly v. Brooklyn H. R. Co.*, 65 App. Div. (N. Y.) 453, 72 N. Y.

§ 391. **Obstructions in streets.** — Where a street railway company, after tearing up a brick-paved street to lay its tracks, replaces the paving, a pedestrian has a right to presume that the street is safe, and, in the exercise of due care, to act upon such presumption.<sup>42</sup> Where a street car company has obstructed that portion of the street outside of its tracks by snow pushed from that part of the street upon which its tracks are laid, and has obstructed one of its tracks with a repair wagon, so that there remains only the other track upon which a citizen may drive, a driver injured by collision with a car in attempting to pass such repair wagon with his team can recover against the company.<sup>43</sup> Where a street railway company lays a hose across a public highway, from a hydrant at its side to a tank car on the company's track for the purpose of filling the tank with water to be used in sprinkling the company's tracks, the company owes a duty to all travelers on the highway to give such warning of the obstruction as would be reasonably required to protect the traveler from injury occasioned thereby; and whether such warning was in fact given must be a question for the jury.<sup>44</sup> A street railway, by accepting its franchise to operate over public streets, assumes the duty of not leaving declivities on the sides of its track, dangerous to travel, in clearing the snow from its track.<sup>45</sup> Under a statute which

Supp. 1080; *Hewlett v. Brooklyn H. R. Co.*, 63 App. Div. (N. Y.) 423, 71 N. Y. Supp. 531; *Sessalman v. Met. St. Ry. Co.*, 65 App. Div. (N. Y.) 484, 72 N. Y. Supp. 1010; *Duncan v. Union Ry. Co.*, 39 App. Div. (N. Y.) 497, 57 N. Y. Supp. 326; *Tupper v. Met. St. R. Co.*, 36 Misc. Rep. (N. Y.) 819, 72 N. Y. Supp. 868. Where an electric car moving at a moderate rate of speed is run into at a corner by a covered bear wagon, the driver of which, though his view is obstructed, drives at a brisk pace along the street, which there intersects the car track, and into the car, before looking up or

down the street, the driver was at fault; and the motorman is entitled to recover from the driver's employer for the personal injuries suffered. *McCorkle v. Anheuser-Busch Brewing Assn.*, 107 La. 461, 31 So. 762.

42. *Union Tract. Co. v. Barnett*, 31 Ind. App. 467, 67 N. E. 205.

See sections 372, 373, *ante*, herein, as to construction of roadbed, tracks, and appliances.

43. *West Chicago St. R. Co. v. O'Connor*, 85 Ill. App. 278.

44. *North Jersey St. Ry. Co. v. Morhart*, 64 N. J. L. 236, 45 Atl. 812.

45. *Gerrard v. La Crosse City Ry.*

provides that "any person or corporation, except municipal corporations, through whose negligence or carelessness any obstruction or want of repair in a highway is caused, shall be liable to any person injured by reason thereof," a street railroad company is liable for damages caused by a dangerous bank of snow left on the side of its tracks after cleaning them, where it had a reasonable time within which to remove it.<sup>46</sup> In an action against a street railroad for injuries sustained, owing to the piling of snow on a crosswalk by defendant, it having been assumed that the street was a public highway, and it being shown that there was a crossing constantly used, the importance of which the company recognized, as shown by the evidence of the superintendent that he directed the men to clean the snow from all crossings, and that he knew they removed it from that particular crossing, a contention that the street was not a public highway was of no avail to defendant, inasmuch as such question was immaterial.<sup>47</sup>

§ 392. **Obstructing street with cars.** — Where plaintiff was injured by falling over a fender attached to a standing car at night, by reason of the fact that the car was unlighted and unguarded by a motorman, such fact did not constitute *prima facie* evidence of defendant's negligence, under the doctrine of *res ipsa loquitur*, so as to render it incumbent on defendant to show absence of negligence in permitting the car to remain in such condition; and a requested instruction that defendant was entitled to have its cars stand on the tracks for a reasonable length of time, without

Co., 113 Wis. 258, 89 N. W. 125, and a complaint setting forth the requirements of an ordinance that it shall not allow snow or ice to accumulate on its tracks in a quantity to obstruct or hinder the passage of teams, or deposit the same on any portion of any street so as to obstruct it or render it unsafe, or so as to interfere with ordinary travel, also charges a breach of the common-law duty not to render the street unsafe for travel,

by alleging that the company negligently caused the snow and ice on its tracks to be excavated and removed so as to leave a deep ditch, rendering the street unsafe and dangerous for public travel.

46. *Smith v. Nashua St. Ry.*, 69 N. H. 504, 47 Atl. 133.

47. *Newport News & O. P. Ry. & E. Co. v. Bradford*, 4 Va. Sup. Ct. Rep. 219, 40 S. E. 900.

being charged with a breach of duty or an obstruction of the highway, was improperly refused.<sup>48</sup> A street railway company may in operating a single track line having turnout switches for the passage of its cars, stop a car on such a switch for a reasonable time to enable another car to pass, without rendering the stationary car such an obstruction to travel as to constitute a nuisance.<sup>49</sup> But obstructing a street by a street car in violation of a penal ordinance is sufficient proof of negligence on the part of a street railroad company to make it liable for damages to one's carriage by the pole of another in a funeral procession, which is suddenly stopped by the stopping of the car at a crossing.<sup>50</sup> In an action for injuries sustained by an infant in being run over by one of defendant's street cars, which it had left in the street at the end of its line and on which plaintiff and his companions were playing, an instruction that whether the cars should have been permitted to stand on the track in the street when they were not needed for carrying passengers was a question to be determined by the city authorities, and was wholly irrelevant, is not misleading, in connection with another instruction that the matter of leaving the cars and the place where they were left were to be considered by the jury in determining whether defendant was negligent.<sup>51</sup> A street railway company cannot confer valid authority or power upon an individual to violate a city ordinance making it an offense to wilfully obstruct street cars by placing obstructions on the track; nor can any act of the company excuse or justify a party's disregard of such ordinance.<sup>52</sup> The phrase "at each end of the lines," as used in the charter of a street car company, forbidding cars to remain standing on any of the stations more than ten minutes, except "at each end of the lines"

48. *Adams v. Met. St. Ry. Co.*, 82 App. Div. (N. Y.) 354, 81 N. Y. Supp. 553.

49. *Mueller v. Milwaukee St. R. Co.*, 86 Wis. 340, 21 L. R. A. 721, 56 N. W. 914.

50. *Ford v. Charles Warner Co.*, 1 Marv. (Del.) 88, 37 Atl. 39.

51. *George v. Los Angeles Ry. Co.*, 126 Cal. 357, 58 Pac. 819, 46 L. R. A. 829.

52. *State v. Pratt*, 52 Minn. 131, 53 N. W. 1069, so held in a case where defendant was charged with wilfully obstructing and interfering with the running of the cars of a

and the stations nearest passenger depots of other railway companies, means at each end of the tracks, and not at each end of the run of the particular cars.<sup>53</sup>

§ 393. *Rate of speed.* — The statutes in most of the States authorize the authorities in the various municipalities to regulate by ordinance the rate of speed at which street cars shall be operated in the streets of the municipality. Usually, therefore, each municipality has an ordinance fixing the maximum rate of speed, and the limit has been fixed in various cities at rates varying from four to fifteen miles an hour. The violation of such an ordinance is generally held to be some proof of negligence.<sup>54</sup> Where there is no law or ordinance regulating the rate of speed on a city street, the mere fact of a street car running at a high rate of speed does not constitute negligence, but it is for the jury to say, in view of the surrounding conditions at the time, whether such a rate of speed was excessive, and, therefore, dangerous in the circumstances.<sup>55</sup> A rate of speed may be dangerous under special circumstances, though it would not be great, unusual, or excessive under ordinary conditions.<sup>56</sup> The reasonableness of the speed at

street railway, by placing and stopping a house upon and across the tracks.

53. *Wilson v. Duluth St. R. Co.*, 64 Minn. 363, 67 N. W. 82, 4 Am. & Eng. R. Cas. N. S. 53.

54. *Van Patten v. Schenectady St. R. Co.*, 80 Hun (N. Y.) 494, 30 N. Y. Supp. 501, 62 St. Rep. (N. Y.) 378, speed not exceeding four or five miles an hour is not an unusual, excessive, or dangerous rate for a motor car upon city tracks.

55. *Indianapolis St. Ry. Co. v. Bolin*, 39 Ind. App. 169, 5 St. Ry. Rep. 192, 78 N. E. 210; *West Chicago St. Ry. Co. v. Callow*, 102 Ill. App. 323; *Stanley v. Cedar Rapids & M. C. R. Co.*, 119 Iowa 526, 93 N. W. 489; *Bittner v. Crosstown St. Ry.*

*Co.*, 153 N. Y. 76, 46 N. E. 1044; *Kline v. Electric Tract. Co.*, 181 Pa. St. 276, 40 W. N. C. 337, 37 Atl. 522; *Hughes v. Camden & O. Ry. Co.*, 65 N. J. L. 203, 47 Atl. 441; *Francisco v. Troy & L. R. Co.*, 78 Hun (N. Y.) 13, 29 N. Y. Supp. 247.

Where plaintiff was struck by a car running at the rate of from 26 to 29 miles an hour at a street crossing, the court could not say, as a matter of law, that the speed of the car was reasonable, but should have submitted that question to the jury. *Wolf v. City Ry. Co.*, 50 Oreg. 64, 6 St. Ry. Rep. 265, 91 Pac. 460.

56. *Garfield v. Hartford & Springfield St. Ry. Co.*, 80 Conn. 260, 6 St. Ry. Rep. 826, 67 Atl. 890.

which a car is run is to be measured by the relation of that speed to the particular circumstances under which it is maintained. A speed of twenty miles an hour might not be unreasonable in the open country, where the view is unobstructed, and there are no travelers in sight. A speed of three or four miles an hour might be unreasonable in a crowded street, when other vehicles or pedestrians were on the tracks in front, or obviously on the point of crossing them.<sup>57</sup> Street railway companies in operating their cars along public streets have a common right in the highway with other travelers, and in the absence of any law or municipal ordinance regulating the speed of their cars, they must be run at such speed, and must be kept in such control, as not to interfere unreasonably with the rights of others upon the highway.<sup>58</sup> Ordinarily the test of negligence in the rate of speed is whether or not the car was running at the speed at which an ordinarily prudent man would have run the car under similar circumstances, or was held under proper control.<sup>59</sup> It is the duty of an electric motorman to keep

**57.** *Smith v. Connecticut Ry. & L. Co.*, 80 Conn. 268, 6 St. Ry. Rep. 830, 67 Atl. 888.

**58.** *Newark Pass. R. Co. v. Block*, 55 N. J. L. (26 Vroom) 605, 22 L. R. A. 374, 27 Atl. 1067, 56 Am. & Eng. R. Cas. 590; *Lawler v. Hartford St. R. Co.*, 72 Conn. 74, 43 Atl. 545; *Ewing v. Toronto R. Co.*, 24 Ont. (Can.) Rep. 694; *Hawkins v. Pittsburgh, A. & M. Traction Co.*, 173 Pa. St. 149, 38 W. N. C. 163, 26 Pittsb. L. J. N. S. 427, 33 Atl. 1045; *Reilly v. Third Ave. R. Co.*, 16 Misc. Rep. (N. Y.) 11, 37 N. Y. Supp. 593, 73 St. Rep. (N. Y.) 289; *Dobert v. Troy City R. Co.*, 91 Hun (N. Y.) 28, 36 N. Y. Supp. 105, 71 St. Rep. (N. Y.) 392; *Cincinnati St. Ry. Co. v. Lewis*, 23 Ohio C. C. 127; *Cosgrove v. Met. St. Ry. Co.*, 74 App. Div. (N. Y.) 166, 77 N. Y. Supp. 624; *affd.*, 173 N. Y. 628, 66 N. E. 1106; *Fullerton v. Met. St. Ry. Co.*, 63 App.

*Div. (N. Y.)* 1, 71 N. Y. Supp. 326; *affd.*, 170 N. Y. 592, 63 N. E. 1116.

**59.** *Stafford v. Chippewa Val. Elec. Ry. Co.*, 110 Mo. 331, 85 N. W. 1036; *Breary v. Traction Co.*, 5 Pa. Dist. R. 95; *Toronto R. Co. v. Gosnell*, 24 Can. D. C. 582; *Graham v. Consol. Tract. Co.*, 64 N. J. L. 10, 44 Atl. 964, a verdict in plaintiff's favor in an action against a trolley company for running over a boy, on the ground that the car was run at an excessive rate of speed, will be set aside where the evidence as to the high rate of speed is vague and unsatisfactory, and the evidence as to a proper rate of speed is supported by the fact that the car was stopped within a few feet after the motorman discovered the boy's peril; *Marion City Ry. Co. v. Buboise*, 23 Ind. App. 342, 55 N. E. 266, a special finding by a jury in an action for injury to plaintiff's wife to the effect that she was in-

his car so far under control as to avoid injuries to pedestrians or persons in other vehicles who are in the exercise of due care to avoid injury, and it is a question for the jury as to whether the motorman of a street car lost control thereof because the car was running at a dangerous rate of speed.<sup>60</sup> Where a city ordinance permits a certain rate of speed, and the car does not exceed that speed, negligence cannot be imputed to the defendant on account of the speed alone;<sup>61</sup> but, although the rate of speed in a particular case may not have been in excess of that allowed by a statute or ordinance, it may be negligent in view of the surrounding circumstances.<sup>62</sup> The violation of an ordinance regulating the rate of speed is not sufficient negligence upon which to maintain an action, unless such violation were the proximate cause of the injury.<sup>63</sup> The fact that the car was moving at a rate of speed prohibited by an ordinance of the city will not of itself entitle the plaintiff to recover. The mere fact that a street car is running at a higher rate of speed than any municipal ordinance allows does

jured by being thrown out of a buggy because plaintiff's horse was frightened by defendant's car approaching a long covered bridge from around a curve 800 feet distant therefrom at the rate of twelve miles an hour, and that the place was such as would be likely to frighten a horse of ordinary gentleness; also that the motorman endeavored to stop the car as soon as he saw the horse's fright, and did so at a point 90 or 100 feet from the bridge, and 84 feet from where plaintiff's wife was thrown out, contradicts a general verdict finding the company guilty of negligence.

**60.** Consolidated Tract. Co. v. Glynn, 59 N. J. L. (30 Vroom) 432, 37 Atl. 66; Birmingham Ry. & E. Co. v. City Stable Co., 119 Ala. 615, 24 So. 558; Richmond Ry. & E. Co. v. Garthwright, 92 Va. 627, 24 S. E. 267, 32 L. R. A. 220; Cincinnati St. R. Co. v. Snell, 54 Ohio St. 197, 43

N. E. 207, 32 L. R. A. 276; Gosnell v. Toronto R. Co., 21 Ont. App. 553; Davidson v. Schuylkill Tract. Co., 4 Pa. Super. Ct. 86; Strauss v. Newburgh El. R. Co., 6 App. Div. (N. Y.) 264, 39 N. Y. Supp. 998; Cox v. Wilmington City Ry. Co., 4 Penn. (Del.) 162, 53 Atl. 569; Gray v. St. Paul City Ry. Co., 87 Minn. 280, 91 N. W. 1106; Bass' Admr. v. Norfolk Ry. & L. Co., 3 Va. Sup. Ct. Rep. 571, 40 S. E. 100.

**61.** White v. Albany Ry. Co., 35 App. Div. (N. Y.) 23, 54 N. Y. Supp. 445; Rack v. Chicago St. Ry. Co., 69 Ill. App. 656.

**62.** Atherton v Tacoma Ry. & P. Co., 30 Wash. 395, 71 Pac. 39.

**63.** Davidson v. Schuylkill Tract. Co., 4 Pa. Super. Ct. 86; Dederichs v. Salt Lake City Ry. Co., 6 Am. Electl. Cas. (Utah) 592; Trumbo v. City St. Car Co., 89 Va. 780, 17 S. E. 124, 17 Va. L. J. 207.

not give one injured by his own carelessness by impact with such a car a right of action.<sup>64</sup> A reasonable and lawful rate of speed for a street car drawn by horses upon a public street, in the absence of statute or ordinance, was held by the New York Court of Appeals to be not faster than that ordinarily reached by horses drawing loads of passengers in carriages, while the motive power is under such control as easily to be slackened in speed, and quickly stopped entirely; so that others may use the track without risk of harm if all concerned are ordinarily prudent and careful.<sup>65</sup> It is the duty of the motorman of a trolley car which is overtaking another vehicle which is directly in line with its progress and a possible obstacle in its way, to reduce the car to such control that it may be brought to a standstill if necessary, before reaching such vehicle.<sup>66</sup> And he does not have the right to increase the speed of the car where a person driving on the track in front of the car has left it upon the sounding of the gong, where he knows or has reason to believe that such person is not aware of the approach of the car.<sup>67</sup> The right to consider the rate of speed of electric cars reckless, although less than fifteen miles an hour, is not restricted by a general statute, which confers power on local authorities to regulate the speed of such cars, with the restriction that a greater rate than fifteen miles per hour shall not be allowed.<sup>68</sup>

**§ 394. Rate of speed — Application of rules.** — It is negligence to run an electric street car along a narrow and unlighted alley, on a dark night, at a rate of speed that will not permit its stoppage within the distance covered by its own headlight;<sup>69</sup> to run it at an

**64.** *Harris v. Lincoln Traction Co.*, 78 Neb. 681, 6 St. Ry. Rep. 748, 111 N. W. 580.

**65.** *Adolph v. Central Park, etc.*, R. Co., 76 N. Y. 530; *Brown v. Twenty-third St. R. Co.*, 4 N. Y. Supp. 102, 56 N. Y. Super. Ct. 356.

**66.** *Consol. Tract. Co. v. Haight*, 59 N. J. L. (30 Vroom) 577, 37 Atl.

135; *Boyles v. Monongahela St. Ry. Co.*, 20 Pa. Super. Ct. 443.

**67.** *Wilkins v. Omaha & C. B. Railway & Bridge R. Co.*, 96 Iowa 668, 65 N. W. 987.

**68.** *Laufer v. Bridgeport Tract. Co.*, 68 Conn. 475, 37 Atl. 379, 2 Chic. L. J. Wkly. 287.

**69.** *Gilmore v. Federal St. & P.*

unusual speed through a cut which, in anticipation of a change of grade, has been made in the street, in such a manner that persons driving along the street must drive upon the track;<sup>70</sup> to run it over a crossing in a much traveled street, at a high and dangerous rate of speed, or without being on the lookout, and having the car under control, and using the proper means to stop it so as to avoid a collision;<sup>71</sup> while running at a speed twice that allowed by law, to fail to apply the brake upon seeing a child crossing the street, when if it had been applied the car could have been stopped in season to avoid injury;<sup>72</sup> to run a car on the down grade, in a populous part of a city, at from fifteen to twenty miles an hour, until within fifty to sixty feet of the crossing, where buildings obstruct the view of one crossing;<sup>73</sup> to run a car ten miles an hour through a street crowded with children, where the view in front of the car is unobstructed, unless careful lookout be kept;<sup>74</sup> to run a car along the streets of a city on a dark and stormy night at a speed of fifteen miles per hour without a headlight and without sounding a gong or whistle at street crossings;<sup>75</sup> to run at such a rate of speed that on a dark night the motorman cannot see a wagon on the track in front of the car in time to prevent a collision;<sup>76</sup> or even at ordinary speed and near a street crossing, without sounding the gong or giving some notice of its approach;<sup>77</sup>

V. Pass. Ry. Co., 153 Pa. St. 31, 31 W. N. C. 507, 23 Pittsb. L. J. N. S. 438, 25 Atl. 651, 4 Am. Electl. Cas. 490.

**70.** Greeley v. Federal St., etc., R. Co., 153 Pa. St. 218, 25 Atl. 796.

**71.** Watson v. Minneapolis St. R. Co., 53 Minn. 551, 55 N. W. 742, 4 Am. Electl. Cas. 510; West Chicago St. Ry. Co. v. McCallum, 67 Ill. App. 645; Rosenberg v. West End St. R. Co., 168 Mass. 561, 47 N. E. 435.

**72.** Huerzeler v. Central Crosstown R. Co., 1 Misc. Rep. (N. Y.) 136, 20 N. Y. Supp. 676, 48 St. Rep. (N. Y.) 649; affd., 139 N. Y. 490, 34 N. E. 1101.

**73.** Shea v. St. Paul City R. Co., 50 Minn. 395, 52 N. W. 902, 4 Am. Electl. Cas. 481, 7 Am. R. & Corp. Rep. 1.

**74.** Buente v. Pittsb., etc., Tract. Co., 2 Pa. Super. Ct. 185.

**75.** Nelson v. Chicago, L. S. & S. B. Ry. Co., 41 Ind. App. 397, 6 St. Ry. Rep. 841, 83 N. E. 1019.

**76.** Calumet El. R. Co. v. Lynholm, 70 Ill. App. 371; United Ry. & El. Co. v. Seymour, 92 Md. 425, 48 Atl. 850.

**77.** Schwartzbaum v. Third Ave. R. Co., 54 App. Div. (N. Y.) 164, 66 N. Y. Supp. 367; Brozek v. Steinway R. Co., 10 App. Div. (N. Y.) 360, 41 N. Y. Supp. 1017.

or at a high rate of speed without having it properly lighted or sounding the gong;<sup>78</sup> or at such a rate of speed that it cannot be stopped within one hundred feet after an alarm given;<sup>79</sup> or to ascend a grade toward a bridge at so great a speed as to be unable to stop the car in time to avoid collision with a wagon on the track;<sup>80</sup> or at such speed as to carry a horse, buggy, and occupant, collided with, one hundred feet;<sup>81</sup> running a car at the rate of forty-five miles an hour past platforms built on either side of a double track running east and west, connected by a crosswalk running from the sidewalk on the north side of the street, there being no sidewalk on the south side thereof, and these platforms being frequently used by the public, and the usual speed of the cars at that point being twenty miles an hour;<sup>82</sup> to fail to check the speed of a car on approaching a crossing over which a loaded truck is being driven.<sup>83</sup> In a case in Illinois a verdict for plaintiff was sustained on the ground that the court could not say that it was not negligence for the motorman to disregard the probability that pedestrians delayed by wagons at a crowded street crossing might come close after them on the track, and to move his car at such a speed that it could not be stopped in six feet.<sup>84</sup> Running an electric car at an unusually rapid rate over a much frequented crossing, when the usual rate of travel on the line is from twelve to fourteen miles per hour, constitutes negligence which is little less than wanton and reckless disregard of human life.<sup>85</sup> The

**78.** *Driscoll v. Market St. Cable R. Co.*, 97 Cal. 553, 32 Pac. 591; *Tompkins v. Scranton Tract. Co.*, 3 Pa. Super. Ct. 576; *South Covington & C. St. R. Co. v. Beatty*, 20 Ky. L. Rep. 1845, 50 S. W. 239, 6 Am. Neg. Rep. 75; *Cincinnati St. R. Co. v. Snell*, 54 Ohio St. 197, 43 N. E. 207, 32 L. R. A. 276.

**79.** *Cross v. California St. Cable R. Co.*, 102 Cal. 313, 36 Pac. 373; *Frank v. Met. St. Ry. Co.*, 58 App. Div. (N. Y.) 100, 68 N. Y. Supp. 537.

**80.** *Toledo Consol. St. R. Co. v. Rohner*, 9 Ohio C. C. 702.

**81.** *Gress v. Braddock, etc., R. Co.*, 14 Pa. Super. Ct. 87.

**82.** *Walker v. St. Paul City Ry. Co.*, 81 Minn. 404, 84 N. W. 222, 51 L. R. A. 632.

**83.** *Hergert v. Union R. Co.*, 25 App. Div. (N. Y.) 218, 49 N. Y. Supp. 307.

**84.** *Chicago City Ry. Co. v. Loomis*, 102 Ill. App. 326, 66 N. E. 348.

**85.** *Evansville St. R. Co. v. Gen-*

presence of children in the roadway of a street two or three feet from the curb does not require the reduction of the speed of a cable car running twelve miles an hour, so that the car may be stopped if such children impulsively start to run across the street, when they apparently have no intention of crossing the street.<sup>86</sup> The negligence of defendant's motorman in operating its car at an excessive rate of speed, and in failing to have it under proper control, does not authorize a recovery for injuries to plaintiff's team sustained in a collision with the car, when the collision could not have been avoided even if the car had been driven at a proper rate of speed, and had been under proper control.<sup>87</sup> But if the injury is occasioned when the car is run at a reckless rate of speed, the company is not relieved from liability because the person injured was prevented from pulling out of the track by a wagon which was following a car on the adjoining track, in the absence of evidence of any improper conduct on the part of the driver of such wagon; <sup>88</sup> nor, if running at a high rate of speed, is it relieved by the fact that the driver of a vehicle in front of the street car, in his efforts to avoid instantaneous disaster, was compelled to turn rapidly to the right, and, while he succeeded in clearing the track, he upset the cutter in attempting to drive over a ridge of ice and snow lying between the track and the highway, whereby one of the occupants of the cutter was thrown out, struck by the step or snow scraper on the rear end of the car and killed; <sup>89</sup> nor, where the furious rate of speed of the car, coupled with the attempt of plaintiff to get out of the way, caused the accident, because plaintiff was thrown from his cart, not by the collision with the car, but by the subsequent striking of the wheel against the curb.<sup>90</sup>

try, 147 Ind. 408, 44 N. E. 311, 37 L. R. A. 378.

**86.** *Rack v. Chicago City R. Co.*, 69 Ill. App. 656.

**87.** *Hoffman v. Syracuse R. T. Co.*, 50 App. Div. (N. Y.) 83, 63 N. Y. Supp. 442.

**88.** *Harper v. Phila. Tract. Co.*,

175 Pa. St. 129, 38 W. N. C. 349, 34 Atl. 356.

**89.** *Countryman v. Fonda, J. & G. R. Co.*, 166 N. Y. 201, 59 N. E. 822.

**90.** *Walsh v. Atlantic Ave. R. Co.*, 23 App. Div. (N. Y.) 19, 48 N. Y. Supp. 343.

§ 395. **Frightening animals.**—A street car company is not liable for accidents arising from fright to horses, caused by the usual operation of its road, if its employees are free from negligence, and this must be determined from the facts and circumstances in each case. The duty of a motorman to keep the car moving and to sound the gong does not exonerate him from negligence or want of ordinary care in doing so, where he sees horses frightened by the approach of the cars and the sound of the gong, and rapidly becoming unmanageable.<sup>91</sup> The right of a surface railroad company to run its cars within the bounds of a highway includes the right to do such things and make such noises as are necessary, usual, and incidental to such use. Where, therefore, a trolley car running upon a surface railroad, which crossed a public highway at grade, was stopped at the crossing, at the edge of the highway, and remained standing while a person riding in a wagon drawn by a gentle horse, accustomed to the cars, passed along the

**91.** *Wachtel v. East St. Louis St. L. Elec. R. Co.*, 77 Ill. App. 465; *Kankakee Elec. R. Co. v. Lade*, 56 Ill. App. 454. A street railway company is not liable for the frightening of a horse by the usual and necessary noise incident to the starting of the car, while the horse is driven past it, where the horse showed no indications of fright before the car started. *McDonald v. Toledo Consol. St. R. Co.*, (C. C. A., 6th C.) 43 U. S. App. 79, 1 Ohio Dec. Fed. 294, 29 Chic. Leg. N. 35, 36 Ohio L. J. 49, 74 Fed. 104; *Myers v. Brantford St. R. Co.*, (Can.) 27 Ont. App. 513.

**If a horse takes fright at an approaching car**, and, because the car is not stopped or because the sounding of the gong or the ringing of the bell is not discontinued, and becomes unmanageable and runs away, injuring the driver and others, the company is not liable, unless the conduct complained of, in the man-

agement of the car, is attributable only to wanton or malicious disregard for the safety of the driver or other travelers upon the street, *Chapman v. Zanesville St. Ry. Co.*, 27 Ohio L. J. 70; *Coughty v. Willamette St. Ry. Co.*, 21 Oreg. 245, 27 Pac. 1031; *Cornell v. Detroit City Elec. Ry. Co.*, 82 Mich. 495, 46 N. W. 791; *Steiner v. Phila. Tract. Co.*, 134 Pa. St. 199, 19 Atl. 491; *North Side St. Ry. Co. v. Tippins*, (Tex.) 3 Am. Electl. Cas. 489, 14 S. W. 1067; *Galesburg Elec. M. & P. Co. v. Manville*, 61 Ill. App. 490, 6 Am. Electl. Cas. 476, or unless the employee in charge thereof was guilty of some misconduct after discovering that the horse was frightened. *Ayars v. Camden & S. Ry. Co.*, 63 N. J. L. 416, 43 Atl. 678.

**Failure to fence right of way** as required by statute so as to prevent animals from straying onto track may render company liable.

highway in front of the car, but the motorman, before the wagon had entirely passed the car, released the air brakes thereof, causing the usual hissing sound as the air escaped, which frightened the horse and caused it to spring suddenly into a ditch on the side of the road, whereby the wagon was upset and the person driving it injured, and an action to recover for such injuries was brought against the railroad company, the act of the motorman in releasing the air brakes, before the plaintiff passed beyond the car, was insufficient to impute negligence to the defendant, and there was no evidence to justify the submission of the question of defendant's negligence to the jury.<sup>92</sup> Although it is the duty of the gripman or motorman to ring his gong with emphasis upon proper occasions, it may be negligence to ring it violently and without necessity in the face of a frightened horse, whose fright is observed by him, or to continue to sound the gong after he sees that the horse is greatly frightened thereat.<sup>93</sup> A motorman is not negligent in ringing the gong on his car in a public street half a dozen or a dozen times, so as to render the company liable for personal injuries resulting from the fright of a horse caused thereby, where there was nothing in the behavior of the horse prior to the accident indicating that it was frightened.<sup>94</sup> The failure of a motorman, when running a car at the ordinary speed, to stop or lessen its speed upon observing that a horse approaching from the opposite direction is frightened is not negligence, unless the circumstances indicate that the horse has, or will become unmanageable upon the approach of the car, and that the driver or persons with him are

Campbell v. Indianapolis & N. W. Tr. Co., 39 Ind. App. 66, 5 St. Ry. Rep. 263, 79 N. E. 223.

**92.** Hoag v. South Dover Marble Co., 192 N. Y. 412, 6 St. Ry. Rep. 373, 85 N. E. 667

**93.** Lightcap v. Phila. Tract. Co., (C. C., E. D. Pa.) 60 Fed. 212; Ellis v. Lynn & B. R. Co., 160 Mass. 341, 35 N. E. 127. The continuous sounding of the bell or gong upon a street car approaching a team from behind,

when the person operating the car sees, or by the exercise of ordinary diligence could have seen, that the team has become unmanageable, is negligence, rendering the company liable. Citizens' St. R. Co. v. Hair, (Tex.) 32 S. W. 1050.

**94.** Henderson v. Greenfield & T. F. St. R. Co., 172 Mass. 542, 52 N. E. 1080; Mineral St. Ry. Co. v. Maynard, 5 Ind. App. 372, 32 N. E. 343.

or will be put in imminent peril.<sup>95</sup> A motorman is not chargeable with negligence in failing to stop or slacken the speed of his car upon observing that a horse approaching from the opposite direction is frightened, unless the circumstances indicate that the horse will be uncontrollable if the car approaches, and that the driver or the persons with him are in imminent peril.<sup>96</sup> So where, though a horse was frightened as the car approached from in front, but there was nothing to charge those in control of the car with notice that the animal would in the natural course of events, while in such a state of alarm, get upon the tracks, and his action which culminated in the collision was sudden, unexpected, and unusual, it was held that the defendant company was not negligent in failing to stop or slacken the speed of its car.<sup>97</sup> A motorman is not required to check the speed of his car every time he is notified to do so by the owner of a skittish horse on the street; and his failure to so stop where no imminent peril is indicated will not render the company liable for resulting damages, unless his conduct can be attributed only to malicious disregard of the safety of the injured person.<sup>98</sup> Reasonable means to prevent scaring horses, and

**95.** *Mahoning Valley S. E. Ry. v. Houston*, 29 Ohio C. C. 358, 6 St. Ry. Rep. 139, citing *Terre Haute Elec. Ry. v. Yant*, 21 Ind. App. 486, 51 N. E. 732, 69 Am. St. Rep. 376; *Eastwood v. Railway*, 94 Wis. 163, 68 N. W. 651; *Flaherty v. Harrison*, 98 Wis. 559, 74 N. W. 360.

**96.** *Terre Haute Elec. R. Co. v. Yant*, 21 Ind. App. 486, 51 N. E. 732, 1 Rep. 181; *East St. L. & St. L. Elec. R. Co. v. Wachtel*, 63 Ill. App. 181; *Doster v. Charlotte St. R. Co.*, 117 N. C. 651, 34 L. R. A. 481, 23 S. E. 449; *Steiner v. Phila. Tract. Co.*, 134 Pa. St. 199. A street railway company is liable for the injury of one whose team is run into by another team caused to run away by its motorman's failing to slacken speed after discovering that it was

frightened at the car. *Lines v. Winnipeg Elec. St. R. Co.*, 11 Manitoba 77.

**97.** *Moxley v. Southwest Missouri Elec. Ry. Co.*, 123 Mo. App. 80, 5 St. Ry. Rep. 687, 99 S. W. 763.

**98.** *Molyneux v. Southwick No. Elec. R. Co.*, 81 Mo. App. 25. Where a motorman in charge of an electric car came suddenly upon a woman and a little boy with a horse and buggy, in the narrow limits of a public street obstructed with building material, and instead of slackening his speed he ran by them, sounding the gong without ceasing, when the horse took fright, turned over the buggy, and ran away, injuring itself, the buggy, and the woman's clothing, the street car company was liable. *Springfield Consol. Ry. Co. v. Ank-*

thereby injuring persons riding or driving along the street must be taken when a street railway car is propelled in such a condition that a reasonably prudent man would apprehend that it would frighten horses. Negligence in running a car on an electric street railway, having a sprinkler thereon upon which waving black coats are hung, without reasonable care to prevent frightened horses, renders the street railway company liable, and it is immaterial who placed the coats in that position, if the car was operated with knowledge that they were there.<sup>99</sup> The fact that a street railway

rom, 93 Ill. App. 655. The motorman of an electric car is not bound to slacken his speed and stop his car at the moment a horse upon the street within his range of vision begins to show signs of uneasiness, and an inference of negligence is not justified from his failure to stop the car upon seeing a gentle team about 175 feet in advance, driven by a full-grown man, was beginning to prance, where the team was on a well-traveled road at the side of the track nearly sixteen feet in width, and was in perfect safety, and there is no evidence that it seemed to be beyond the driver's control. *Eastwood v. La Crosse City R. Co.*, 94 Wis. 163, 68 N. W. 651. A motorman of an electric car not running at a negligent rate of speed is not chargeable with negligence in failing to stop or slow up the car upon seeing that a team at the side of the track were uneasy, where the driver had control of them until at the instant when they dashed on the track in front of the car. *Flaherty v. Harrison*, 98 Wis. 559, 10 Am. & Eng. R. Cas. N. S. 176, 74 N. W. 360.

**99.** *McCann v. Consol. Tract. Co.*, 59 N. J. L. (30 Vroom) 481, 36 Atl. 388, 38 L. R. A. 236, 7 Am. & Eng. R. Cas. N. S. 280. The motorman of

an electric car is guilty of negligence rendering the company liable, where, after observing that a horse attached to a buggy is frightened at the ringing of the gong, he makes no effort to stop the car and does not cease ringing the gong, as a result of which the horse runs away injuring the driver. *Owensboro City R. Co. v. Lyddane*, 19 Ky. L. Rep. 698, 41 S. W. 578. An electric street car is not such a defect or object within the limits of a highway, calculated to frighten horses of ordinary gentleness, as will render the company liable for injuries due to the fright of a horse thereat. *Bishop v. Bell City St. R. Co.*, 92 Wis. 139, 65 N. W. 733.

**In an action against a street railway company** to recover damages for the death of a horse, a verdict for plaintiff will be sustained where it appears that plaintiff, in driving a sleigh, approached a sweeper at a point where it was difficult, if not impossible, to turn back; that when sixty feet from the sweeper the horse took fright; that plaintiff jumped out of the sleigh, motioned the sweeper to stop, and after it had stopped, led the horse by in safety to a point variously estimated at from fifteen to sixty feet ahead, and when about to mount the

company replaced a burned-out motor in one of its cars with a new one, the operation of which for a time produced a loud and unusual noise, did not make the company responsible for injuries caused by a horse which took fright thereby, unless it is shown that the noise was unnecessary as well as unusual.<sup>1</sup> A street railway company is not liable for an injury to one driving along the highway whose horse is frightened by the sudden and unusual noise of the passengers in such car.<sup>2</sup> A motorman of an electric car, who sees a horse which appears to be restless or refractory, must manage the car in such way as to relieve the traveler from his dilemma.<sup>3</sup> So, where it appeared from plaintiff's evidence that the car was making an unusual noise and also that, after the frightened condition of the horse had become apparent by his behavior, the trolley car continued to follow up the frightened horse at a high rate of speed, which was kept up for several city blocks, during which the horse became manifestly unmanageable and ran

sleigh the sweeper started, the horse took fright, ran away, and suffered injuries so that it had to be killed. *Obold v. United Trac. Co.*, 19 Pa. Super. Ct. 326.

**A street car driver may be deemed negligent** in swinging his team directly across the street at right angles to the car, immediately in front of an approaching vehicle, without looking or listening, if thereby the team attached to such vehicle becomes frightened and runs away. *Sutter v. Omnibus Cable Co.*, 107 Cal. 360, 40 Pac. 484. A motorman who stops his car to allow a funeral procession to pass and starts it again before all the wagons in the procession have passed, may be deemed negligent if thereby a horse attached to one of the wagons becomes frightened and backs the wagon in front of the car. *Richter v. Cicero & P. St. R. Co.*, 70 Ill. App. 196.

**1.** *Hill v. Rome St. R. Co.*, 101 Ga. 66, 28 S. E. 631. The fright of a mule caused by the usual noise incident to running a street car by electricity, without any unnecessary noise made for the purpose of scaring the animal, does not make the street railway company liable for resulting damages. *Doster v. Charlotte St. R. Co.*, 117 N. C. 651, 23 S. E. 449, 34 L. R. A. 481.

**2.** *Boatwright v. Chester & M. Elec. R. Co.*, 4 Pa. Super. Ct. 279, 40 W. N. C. 330, 6 Del. Co. Rep. 558.

**3.** *Flewelling v. Lewiston & A. H. R. Co.*, 89 Me. 585, 36 Atl. 1056. That a horse appears frightened and unmanageable at a distance of 300 feet from an electric car does not require the motorman, who observes the condition, to stop the car until the horse has passed. *Citizens' St. R. Co. v. Lowe*, 12 Ind. App. 47, 39 N. E. 165, 5 Am. Electl. Cas. 436.

away, a judgment for the plaintiff was affirmed.<sup>4</sup> So, where while the car was about seventy-five feet away, a horse which was frightened backed a runabout upon the track, and the motorman if keeping a reasonable lookout could have seen the actions of the horse, it was held that he should have slackened the speed of the car or have stopped it in order to prevent a collision.<sup>5</sup> An electric railway company is liable for personal injuries sustained by one whose horse was frightened by an approaching car, and became unmanageable and ran across the track, where the motorman could easily have observed its fright and slackened speed or stopped the car in time to prevent a collision.<sup>6</sup> The use of a steam engine on a street railroad, even where the charter of the company authorized it, has been held to render the company liable for negligence resulting in frightening of a horse and injury to the driver;<sup>7</sup> but the use of a dummy engine has been held not necessarily negligent so as to make the company liable.<sup>8</sup> The poles of a trolley line may be so placed in the street as to amount to an unlawful obstruction, in view of the fact that animals are likely to be frightened by the passing of the electric cars and to shy, causing the vehicles being drawn by them to collide with the poles.<sup>9</sup> Where a runaway horse enters a street on which a street car line is operated, and the driver and horse both know of the approach of a car,

4. *Applegate v. West Jersey & S. R. Co.*, 73 N. J. L. 722, 6 St. Ry. Rep. 836, 65 Atl. 127.

5. *South Covington & C. St. Ry. Co. v. Cleveland*, 30 Ky. L. Rep. 1072, 5 St. Ry. Rep. 338, 100 S. W. 283.

6. *Marion St. R. Co. v. Carr*, 10 Ind. App. 200, 37 N. E. 952.

7. *Lincoln R. T. Co. v. Nichols*, 37 Neb. 332, 56 Am. & Eng. R. Cas. 584, 55 N. W. 873, 20 L. R. A. 853, where it was used on a street constantly filled with persons on horseback, and buggies, wagons, and carriages, and which men, women, and children used for business, pleasure, or recreation.

8. *Rome St. R. Co. v. McGinnis*, 94

Ga. 229, 21 S. E. 707, where the accident was caused by the sudden backward movement of the car on a reversal of the engine at about the same moment that the conductor caused the brake to be taken off, which some unauthorized person had applied to the car, neither the conductor nor the engineer knowing what the other was about to do, and when the wagon with which the car collided was brought upon the track by the sudden fright of the team, caused by the backing of the train.

9. *Cleveland v. Bangor St. R. Co.*, 86 Me. 232, 4 Am. Electl. Cas. 398, 29 Atl. 1005.

it is useless and negligent for the motorman to violently ring his bell, and his act cannot be justified as being to assist the driver in keeping the horse from the car.<sup>10</sup> In any case, however, one claiming to recover against the railroad company must establish to the satisfaction of the jury that, in the light of all the circumstances the motorman had not acted as a person of ordinary prudence would have acted in the same circumstances, since the right to recover rests on the establishment of the defendant's negligence.<sup>11</sup> Mere failure of one driving along a street in which there is an electric street railway to look for approaching cars, will not prevent recovery for injuries sustained from the horse becoming frightened by an overtaking car, and springing to one side.<sup>12</sup> A skilled driver is not, as a matter of law, guilty of contributory negligence in failing to turn off upon a side street upon seeing that his horse, which is but four years old, is frightened by a moving electric car, precluding recovery for injuries received in a collision between the car and his carriage as the horse bolts across the track.<sup>13</sup> But, if he knows his horse is unaccustomed to electric cars, and knowing the dangers of such a course, for the purpose of testing the animal, drives him where he knows electric cars will be met, he is guilty of contributory negligence, which

**10.** *Oates v. Met. St. Ry. Co.*, 168 Mo. 535, 68 S. W. 906.

**11.** *Klatt v. Houston Elec. St. Ry. Co.*, (Tex. Civ. App.) 57 S. W. 1112. Where one claims that his horse took fright and ran away, by reason of being struck by a piece of snow or ice thrown from the sweeper of a street railroad company, in the absence of proof that the snow or ice which caused the injury, and which plaintiff said came from the sweeper, did in fact come from the sweeper, and that this was the result of negligence which could have been avoided, a verdict for plaintiff could not be sustained. *Connor v. Met. St. Ry.*

*Co.*, 48 App. Div. (N. Y.) 580, 63 N. Y. Supp. 509. If cars are negligently allowed to stand on a bridge in the public highway, evidence that other horses had become frightened by seeing them standing at the same place where plaintiff's horse took fright is competent. *San Antonio Elec. Co. v. Beyer*, 24 Tex. Civ. App. 145, 57 S. W. 851.

**12.** *Benjamin v. Holyoke St. R. Co.*, 160 Mass. 3, 35 N. E. 95.

**13.** *Flewelling v. Lewiston & A. H. R. Co.*, 89 Me. 585, 36 Atl. 1056. And see *Gibbons v. Wilkes-Barre & S. St. R. Co.*, 155 Pa. St. 279, 26 Atl. 417, 56 Am. & Eng. R. Cas. 600.

will prevent his recovery against the railroad company for injuries sustained by his horse taking fright at the cars.<sup>14</sup>

**§ 396. Injuries to bicyclists.** — A bicycle is a vehicle, may be lawfully ridden upon the highway for convenience, recreation, pleasure, or business, and has the same rights upon the highway as any other vehicle.<sup>15</sup> It is the duty of a person operating a street car to give the usual and sufficient warning to a bicyclist riding on or attempting to cross the track in front of the car, but a motoneer is not chargeable with negligence in approaching at the usual speed from the rear a bicyclist who is riding between the double tracks, although the rider does not look back, or give any indication that he hears the gong, if the latter suddenly turns and attempts to cross the track in front of the car and is injured.<sup>16</sup> The motorman of an electric car, seeing a bicycle rider going on the track in front of him, may assume up to the last moment that the rider will get out of the way, by increasing his speed or turning aside in time to avoid the danger, and he is not required to stop or decrease the speed of his car.<sup>17</sup> A street railroad company is not liable for an injury to a bicyclist resulting from the rider's attempting, while going at a slow rate, to cross the street car track only a few feet in front of a rapidly moving car.<sup>18</sup> Negligence on the part of a motorman, after discovering the peril of a deaf person attempting to ride a bicycle between the tracks in front of the car, which will render the company liable for a collision, is not shown where the rider turns in fifty feet ahead of the car, and proceeds

**14.** *Cornell v. Detroit City Elec. Ry. Co.*, 82 Mich. 495, 46 N. W. 791, 46 Am. & Eng. R. Cas. 201, 3 Am. Electl. Cas. 486.

**15.** *Thompson v. Dodge*, 58 Minn. 555, 60 N. W. 545; *Lindsay v. Winn*, 3 Pa. Dist. Rep. 811, 12 Lanc. L. Rev. 61; *Lacy v. Winn*, 4 Pa. Dist. Rep. 409; *State v. Collins*, 16 R. I. 371, 17 Atl. 131; *Holland v. Bartch*, 120 Ind. 46, 22 N. E. 83; *Swift v. Topeka*, 43 Kan. 671, 23 Pac. 1075;

*Elliott on Roads and Streets* (2d ed.), § 852.

**16.** *Gagne v. Minneapolis St. R. Co.*, 77 Minn. 171, 79 N. W. 671.

**17.** *Everett v. Los Angeles Consol. Elec. R. Co.*, 115 Cal. 105, 34 L. R. A. 350, 43 Pac. 207, 210; *affd.*, 46 Pac. 889; *Medcalf v. St. Paul City Ry. Co.*, 82 Minn. 18, 84 N. W. 633.

**18.** *Lurie v. Met. St. Ry. Co.*, 18 Misc. Rep. (N. Y.) 81, 40 N. Y. Supp. 1129.

to ride ahead of it, at which time the motorman, not knowing of any infirmity on the part of the rider, sounds his gong, knowing that riders are in the habit of remaining between the tracks until the cars are close upon them before turning out, while only ten or twenty seconds elapsed before the collision during which the motorman might have discovered the situation and taken steps to avoid the accident.<sup>19</sup> A motorman is not negligent so as to render the company liable for injuries to a bicyclist who emerges from behind a wagon at a cross street and collides with his car, in momentarily turning his eyes toward the other side of the street, after having looked toward the side from which the bicyclist came, the latter at that time having been concealed by the wagon.<sup>20</sup> A recovery cannot be had for the death of a bicyclist who suddenly and without abatement of speed turned out from behind a street car in front of a car going in another direction, where the street railway company maintained a flagman to warn passersby, and neither they nor the motorman could have seen such bicycle in time to stop the car or warn him.<sup>21</sup> And where it is established that in the course of the work done in connection with the construction of a subway beneath the roadbed of a street railway, a trolley slot thereon would at times spread less than an inch for a distance of about two feet, and in an action against the railway company for personal injuries received by riding a bicycle on the slot, it conclusively appears from the plaintiffs' case that the place in question was safe up to within a short period prior to the accident, the circumstances are not such as to charge defendant with notice of the condition which caused the accident and no case is made out against it either on the theory of nuisance or negligence.<sup>22</sup> But a street railway company is liable for injuries received from collision with a street car by one who was unaccustomed to ride a bicycle, and who, losing control of the wheel, ran into the street

**19.** *Nein v. La Crosse City R. Co.*, 92 Fed. 85, 34 C. C. A. 224.

26 App. Div. (N. Y.) 8, 49 N. Y. Supp. 527.

**20.** *Gould v. Union Traction Co.*, 190 Pa. St. 198, 43 W. N. C. 521, 5 Am. Neg. Rep. 717, 42 Atl. 477.

**22.** *Griffin v. Interurban St. Ry. Co.*, 46 Misc. Rep. (N. Y.) 328, 94 N. Y. Supp. 854.

**21.** *Cardonner v. Met. St. Ry. Co.*,

in which the car was moving, and was injured through the negligence of the company.<sup>23</sup> And where the plaintiff, who was riding a bicycle along a public street, was seriously injured by a fall caused by being compelled to turn suddenly to avoid coming in contact with a live wire, which the trolley of an approaching car had displaced, and caused to fall across the street, an instruction that if the injury was caused by the presence of the fallen wire in the street, the defendant company was *prima facie* guilty of negligence, which, unless rebutted, would entitle plaintiff to recover, was held to be proper.<sup>24</sup> The unexplained breaking of an ear and guy used by an electric railway company raises a presumption of negligence on the part of the company, and an instruction in an action against the company for personal injuries caused by the breaking of the apparatus used to keep the trolley wires in place, that reasonable care would be a high degree of care, where the danger is that of loss of life or serious bodily injury to persons traveling upon the street, because it would be the degree of care commensurate with the apparent danger, properly states the law.<sup>25</sup> Where plaintiff testified that while riding a bicycle on the street he received a severe electric shock from a falling strain wire connected with defendant's trolley wire; defendant's line-men testified that the broken wire was not charged, and that they mended it with their bare hands, and the manner of its attachment to the trolley wire tended to show that it could not have been charged; the testimony of electricians was that plaintiff could not have received a shock therefrom while riding a rubber-tire wheel on a dry asphalt pavement, it was held that a verdict for plaintiff could not stand.<sup>26</sup>

**23.** Louisville Ry. Co. v. Blaydes, (Ky.) 52 S. W. 960, 6 Am. Neg. Rep. 531; affg. 51 S. W. 820, 21 Ky. L. Rep. 480.

**24.** Chattanooga Elec. Ry. Co. v. Minkle, 103 Tenn. 667, 56 S. W. 23, citing Giraude v. Electric Imp. Co., 107 Cal. 120, 40 Pac. 108; Denver Consol. Elec. Co. v. Simpson, 21 Colo.

371, 31 L. R. A. 566, 41 Pac. 499; Snyder v. Wheeling Electric Co., 43 W. Va. 661, 28 S. E. 733, 39 L. R. A. 499.

**25.** Uggle v. West End St. R. Co., 160 Mass. 351, 35 N. E. 1126.

**26.** Walters v. Syracuse Rapid Transit Ry. Co., 64 App. Div. (N. Y.) 150, 71 N. Y. Supp. 853.

§ 397. Collisions with hose carts, fire engines, ambulances, or police patrol wagons. — The driver, motorman, or gripman of a street car is bound to look ahead to observe what is in the road before him, so as to avoid inflicting injury upon others, if it be practicable for him to do so, and the street railroad company is liable for injuries to one driving on its tracks, from a collision with its car through the inattention, carelessness, or incompetency of the person operating the car, where the person injured has been guilty of no contributory negligence.<sup>27</sup> It is the duty of the conductor, as well as the motorman, if either hear the sound of a gong on a hose wagon, or by the exercise of ordinary care, might have discovered the danger in time to have averted a collision, to use all means at hand to that end, and the company is responsible for the negligence of either.<sup>28</sup> And it having been established beyond controversy that the custom was uniform for street cars to stop or slacken speed so as to permit fire vehicles to cross the streets when their approach was known, the drivers of such vehicles have a right to assume that the motorman will comply with such custom.<sup>29</sup> In municipalities where ambulances, hose carts, fire engines, or police patrol wagons are, by ordinance, or by the charter or franchise granting the railroad company the right to operate in the city streets, given the right of way over street cars, this right must be respected by the company in the operation of its cars; and a city ordinance conferring such right, being one of the restrictions under which the railway operates its cars, is admissible in evidence in an action for injuries from collision by a car with such a vehicle, since

**27.** *Swain v. Fourteenth St. R. Co.*, 93 Cal. 179, 28 Pac. 829.

The motoneer of an electric car which passes immediately in front of a fire engine house is guilty of double negligence when he drives the car at full speed in approaching such house, and fails to see, in time to enable him to stop the car and avoid collision with an outcoming hose wagon, a signal given whilst his car is 144 feet

distant from the engine house. *Doie v. New Orleans Ry. & L. Co.*, 121 La. 945, 6 St. Ry. Rep. 290, 46 So. 929.

Collision with fire apparatus. See note, 6 St. Ry. Rep. 290.

**28.** *Williamson v. St. Louis & M. R. Co.*, 133 Mo. App. 375, 113 S. W. 239.

**29.** *Hanlon v. Milwaukee Electric Ry. & Light Co.*, 1 St. Ry. Rep. 821, 118 Wis. 210, 95 N. W. 100.

violation of an ordinance is some evidence of negligence.<sup>30</sup> In Alabama, however, such an ordinance has been held to be irrelevant, since having the right of way would not exempt the driver of the hose cart or other vehicle from the duty of exercising

**30.** *Buy v. Third Ave. R. Co.*, 45 App. Div. (N. Y.) 11, 61 N. Y. Supp. 113.

**Admissibility of ordinance in evidence.** — In an action for the death of a member of the fire department caused by a collision between a street car and a hose wagon, it was proper to allow the plaintiff to introduce in evidence a city ordinance providing that apparatus of the fire department should have the right of way over city streets. *McBride v. Des Moines City Ry. Co.*, 134 Iowa 398, 5 St. Ry. Rep. 296, 109 N. W. 618.

In an action by a fireman to recover for personal injuries resulting from the collision of a fire engine with a street car as the engine emerged from an engine house, a rule of the street railway company that "motormen, \* \* \* when passing by engine houses, must not go faster than four miles per hour," should not be construed as applying only to the forty-two feet directly in front of the engine house. *McKernan v. Detroit Citizens' St. Ry. Co.*, 138 Mich. 519, 101 N. W. 812.

Where one section of a municipal ordinance provided that fire apparatus should have right of way while going to and from fires, and another section declared that the cars of a street railway company should be entitled to the track in all cases where any team or vehicle shall meet or be overtaken, such team or vehicle shall give way to the car, the specified provisions of the ordinance as to fire ap-

paratus must be considered exceptions to the general provisions as to teams and vehicles. *McBride v. Des Moines City Ry. Co.*, 134 Iowa 398, 109 N. W. 618, 5 St. Ry. Rep. 297.

**Under the provisions of the Greater New York Charter**, giving to the insurance patrol a right of way over all vehicles except those carrying the United States mail, and making it a misdemeanor to refuse such right of way, it is the absolute duty of a motorman to grant such insurance patrol a right of way if he have opportunity to do so, irrespective of any requirements as to reasonable care. *Duffghe v. Metropolitan St. Ry. Co.*, 109 App. Div. 603, 96 N. S. Supp. 324.

The driver of a fire truck and the captain in charge thereof have a right to assume that the motorman upon a street car upon discovering the approach of the truck will give the right of way conferred by section 748 of the Greater New York Charter, and in an action to recover damages for injuries to a hook and ladder truck by being struck by a street car, the court may properly refuse to charge the jury that if the driver of the car, upon seeing the cart, calculated he had time to cross the track in safety, the motorman was entitled to that calculation, and was not required to use a higher degree of care than the driver. *City of New York v. Metropolitan St. Ry. Co.*, 90 App. Div. (N. Y.) 66, 2 St. Ry. Rep. 781, 85 N. Y. Supp. 695.

care in driving over the company's tracks.<sup>31</sup> It being important that the apparatus for its extinguishment should reach a fire promptly; and, the men and horses of the fire department being expected and trained to use the utmost expedition for the accomplishment of that purpose, the requirement, that individuals and vehicles engaged upon less pressing missions, shall not only accord them the right of way, but shall hold themselves in readiness to do so when they have reason to anticipate that fire apparatus may appear, is not unreasonable, and that condition may be said to exist when a vehicle, and more particularly a street car, which is confined to its track, approaches a fire engine house situated in close proximity to such track.<sup>32</sup> Where a city ordinance provided that an "ambulance of the department of health" should have the right of way in the streets, in an action to recover for injuries sustained in a collision between an ambulance and a street car in which plaintiff was a passenger, it was held that the ambulance, which did not belong to the department of health, but was under its jurisdiction, was not within the ordinance.<sup>33</sup> Where, in an action for the death of a fireman owing to a collision, at the intersection of streets, between a hook and ladder truck and a street car, there was evidence that if the car had been under control, or the motorman had been keeping a proper lookout, the accident would not have happened, and that the truck should have been allowed to pass first, a verdict for plaintiff, it was held, should not be disturbed.<sup>34</sup> The negligence of the driver

**31.** *Birmingham Ry. & Elec. Co. v. Baker*, 126 Ala. 135, 28 So. 87.

**32.** *Dole v. New Orleans Ry. & L. Co.*, 121 La. 945, 6 St. Ry. Rep. 290, 46 So. 929.

**33.** *Dillon v. Nassau Elec. R. Co.*, 59 App. Div. (N. Y.) 614, 68 N. Y. Supp. 1098.

**34.** *Geary v. Met. St. Ry. Co.*, 73 App. Div. (N. Y.) 441, 77 N. Y. Supp. 54, 84 App. Div. (N. Y.) 514, 82 N. Y. Supp. 1016, the first judgment was reversed for error in the

admission of evidence as to the value of decedent's services.

In an action for the death of a fireman, resulting from the collision of a street car with a hose wagon, evidence examined and held that the motorman was negligent in so housing himself that he did not hear the gong and the approach of the hose wagon, which would otherwise have been plainly heard. *Engvall v. Des Moines City Ry. Co.*, (Iowa) 6 St. Ry. Rep. 440, 121 N. W. 12.

in approaching a street car line on an intersecting street on his way to a fire without having the horses under such control as to permit of stopping them in time to avoid a collision with a car, does not preclude recovery for his death in such a collision, where it was not, in view of the circumstances, including his right to rely upon the motorman's making an effort to stop, negligence to attempt to cross in front of the car.<sup>35</sup> Where a hose cart, going about as fast as the horses could run, and with the gong sounding, collided at a street crossing with a street car, and plaintiff, who was a fireman on the cart, was injured; plaintiff's witnesses testified that the car had stopped before attempting to cross the street on which the cart was approaching, and that the motorman started his car without warning when the cart was only eighteen or twenty feet from the intersection of the streets, and made no attempt thereafter to stop the car; one witness testified that the motorman was looking ahead when he started the car, and another that he was looking back through the car; defendant's witnesses testified that the car did not start, after it had stopped, and that the cart ran into it, it was held that the question whether the motorman saw or heard he approaching cart when he started the car, if he did start it, and wilfully or wantonly, or with reckless indifference to consequences, failed to exercise proper care to prevent the collision, was for the jury.<sup>36</sup> Where the plaintiff was driving the horses, attached to a hose cart, on a run in accordance with his duty, but he

Where, in an action for injuries to a fireman riding on a truck, caused by a collision with a street car, there was evidence that the speed of the car was much too high and prevented a timely stop after the danger to the truck became apparent, and evidence that with any proper use of the appliances at the command of the motorman he might have stopped the car after the peril of the truck was discovered or by ordinary care could have been discovered, it was improper

to direct a verdict for the defendant on the ground that negligence in the operation of the car was not established *prima facie*. *Burleigh v. St. Louis Transit Co.*, 124 Mo. App. 724, 102 S. W. 621.

**35.** *Garrity v. Detroit Citizens' St. R. Co.*, 112 Mich. 369, 4 Detroit Leg. N. 46, 70 N. W. 1018, 37 L. R. A. 529, 2 Chic. L. J. Wkly. 277.

**36.** *Birmingham Ry. & Elec. Co. v. Baker*, 132 Ala. 507, 31 So. 618.

had them under perfect control so that he might have stopped them at the time when he sighted the car, and there was no evidence of any failure on his part to look for the approaching car, the question was whether contributory negligence should be inferred from the fact that he gave head to the horses and attempted to make the crossing after he had sighted the car. In view of the fact that as the driver of a fire apparatus it was necessary for him first of all to seize every opportunity to make expedition, and, therefore, to take every possible chance; and that it is the undisputed and uniform custom of operators of street cars to give fire vehicles the right of way and to slow down and stop to avoid collision; and that it appearing that the plaintiff in approaching the track sounded a gong attached to the hose cart; it was held that the question of contributory negligence was properly one for the jury; that although it might have been negligence for an ordinary traveler to have taken the chance of crossing ahead of a car in the proximity and at the speed of the one in question, still the circumstances surrounding the plaintiff were such that reasonable minds might consider such an attempt made by him to be within the bounds of due care.<sup>37</sup> It is the duty of firemen to get to a fire as quickly as possible after an alarm has been sounded, and an ordinance prohibiting driving or riding upon the streets at a rate of more than six miles per hour is not applicable.<sup>38</sup>

**§ 398. Collisions with steam railroad trains.** — A street railroad constructed in a public highway under authority of law, with a

**37.** *Hanlon v. Milwaukee Elec. R. & L. Co.*, 1 St. Ry. Rep. 821, 118 Wis. 210, 95 N. W. 100. It was also held in this case that an award of damages for \$4,000 was not excessive where it appeared that the plaintiff was thirty-seven years of age, had been in the fire department for nine years, had attained the rank of captain, and was earning a salary of \$100 a month; and his injuries con-

sisted of a permanently loosened and enfeebled knee joint, the crushing in of his chest, leaving him in such a condition as to seriously interfere with any violent exertions, although he still occupied his place in the fire department, finding it extremely difficult by reason of his injuries to successfully perform certain of the work required.

**38.** *Toledo Ry. & Light Co. v.*

roadbed admitting the free use of the highway by all other lawful means of travel, the railroad using cars patterned after the style and size of horse cars, with electric motive power supplied by means of overhead wires supported by poles planted in the sidewalks immediately within the curbs, is only a modification of the public use to which the highway was originally devoted.<sup>39</sup> The same character or degree of care to avoid collisions must, therefore, be exercised by those operating an electric car along a public highway, in crossing a steam railroad which has only the right to operate its road across the highway at grade, as is required from persons driving across it with ordinary vehicles, and they must look and listen for approaching trains, and stop, if necessary, and yield the right of way.<sup>40</sup> The steam railroad, by reason of the momentum of its trains, their fixed place of movement, and the necessities of railroad traffic, has the right of way and precedence for its trains at highway crossings.<sup>41</sup> It is, however, the duty of the railroad company in approaching a highway crossing with its train to exercise ordinary care, such care as a reasonable and prudent person engaged in its business would use, under the circumstances, at the particular crossing, to avoid and prevent collisions with travelers on the highway, vehicles and other means of transportation.<sup>42</sup> The steam railroad may run its cars at such speed as it chooses, in the absence of statutes or municipal ordinance properly restricting it, if it exercises proper care in giving signals.<sup>43</sup> Railroads are not generally bound to place or maintain

Ward, *Adm'r*, 25 Ohio C. C. 399; *Farley v. New York*, 152 N. Y. 222, 46 N. E. 506.

**39.** *West Jersey Ry. Co. v. Camden, G. & W. R. Co.*, 52 N. J. Eq. 31, 29 Atl. 423, 5 Am. Electl. Cas. 137.

**40.** *New York & G. L. Ry. Co. v. New Jersey Electric Ry. Co.*, 60 N. J. L. 52, 38 L. R. A. 516, 37 Atl. 627. See also section 34, chap. II., and cases there cited.

**41.** *Pennsylvania R. Co. v. Goodman*, 62 Pa. St. 329; *Warner v. New York, etc., R. Co.*, 44 N. Y. 465;

*Black v. Burlington, etc., R. Co.*, 38 Iowa 515; *Toledo, etc., R. Co. v. Goddard*, 25 Ind. 185; *Galena, etc., R. Co. v. Dill*, 22 Ill. 264; *Continental Imp. Co. v. Stead*, 95 U. S. 161.

**42.** *Indianapolis, etc., R. Co. v. McLin*, 82 Ind. 435, 8 Am. & Eng. R. Cas. 237; *Weber v. N. Y. Cent., etc., R. Co.*, 58 N. Y. 451; *Baltimore, etc., R. Co. v. Breinig*, 25 Md. 378, 90 Am. Dec. 49; *Western, etc., R. Co. v. King*, 70 Ga. 261, 19 Am. & Eng. R. Cas. 255.

**43.** *New York & G. L. R. Co. v.*

gates, or to station flagmen, watchmen, or guards at highway crossings, in the absence of a statute requiring it, but in special cases, where the precautions may be necessary for the public safety because of the speed and management of its trains or because the crossing is more than ordinarily hazardous as in a thickly populated portion of a town, or where the view is obstructed or the crossing is much traveled, failure to do so may constitute negligence.<sup>44</sup> Where a statute or city ordinance requires it, failure to do so is negligence.<sup>45</sup> And a railroad company which voluntarily and gratuitously establishes gates at a crossing cannot arbitrarily and without any notice to the public suspend their operation while leaving them in position, without being guilty of negligence.<sup>46</sup> In Kentucky it has been held to be gross negligence in a railroad company not to have some one to give notice of the approach of trains at a point near a large city where its road crosses a public thoroughfare, and where street cars cross its tracks until late at night.<sup>47</sup> In Texas it has been held that, although the failure of railroad employees to keep a proper

New Jersey Elec. R. Co., 52 N. J. Eq. 31, 37 Atl. 627.

**44.** Cleveland, C., C. & I. R. Co. v. Reiss, 13 Ohio C. C. 405, 7 Ohio Dec. 450; English v. Southern Pac. Co., 13 Utah 407, 35 L. R. A. 155, 45 Pac. 47; Ravenna v. Pennsylvania Co., 45 Ohio St. 18, 12 N. E. 445; Green v. Eastern R. Co., 52 Minn. 79, 53 N. W. 808; Martin v. New York Cent. & H. R. R. Co., 45 N. Y. Supp. 925, 20 Misc. Rep. (N. Y.) 363, a railroad company in New York is under no obligations to maintain gates or flagmen at a crossing, unless directed so to do by order of the court upon application of the local authorities. N. Y. Cent., etc., R. Co. v. Swartwout, 3 Ohio Dec. 636.

**45.** Indianapolis Union R. Co. v. Neubacher, 16 Ind. App. 21, 43 N. E. 576, rehearing denied, 44 N. E. 669;

Cohn v. N. Y. Cent., etc., R. Co., 6 App. Div. (N. Y.) 196, 30 N. Y. Supp. 986, failure to provide gates or flagmen is not negligence in the absence of legal obligation to do so.

**46.** Chicago & A. R. Co. v. Redmond, 70 Ill. App. 119, 2 Chic. L. J. Wkly. 552. As to negligence for failure to operate gates established at crossings, see Hooper v. Boston & M. R. Co., 81 Me. 260, 17 Atl. 64; Fleming v. Canadian P. R. Co., 31 N. B. 318, holding that the company is under the duty of taking more than ordinary precautions, when such gates are not working. Lake Shore & M. S. R. Co. v. Frantz, 127 Pa. St. 297, 4 L. R. A. 389, 18 Atl. 22; Greenwood v. Philadelphia, W. & B. R. Co., 124 Pa. St. 572, 3 L. R. A. 44, 17 Atl. 188.

**47.** Central Pass. Ry. Co. v. Kuhn,

lookout for street cars which may be approaching the crossing is not, as a matter of law, negligence rendering the railroad company liable for an injury to a passenger on a street car injured by a collision, such failure may justify the jury in inferring negligence as a fact.<sup>48</sup> Whether or not the absence from a railroad crossing of a flagman usually there is such notice to the driver of a street car that it was safe to cross as to excuse him from stopping to look out for trains has been held to be a question for the jury.<sup>49</sup> In Pennsylvania it has been held that the driver of a street car must stop, look, and listen, without regard to the action of a flagman, if he have other sources of information which would lead a prudent man to infer that there was danger to be apprehended from an approaching train.<sup>50</sup> In Ohio it has been held that the existence of gates and a watchman at a railroad crossing does not relieve a street railroad company from the necessity of complying with the provisions of the statute requiring a street car to be stopped and an employee to go ahead to ascertain if the way is clear and safe, and give a signal to that effect, before crossing a railroad track at grade, and that running a street car across a railroad track at grade without taking the precautions required by the statute is negligence — at least in the absence of extraordinary circumstances — for which the street railroad company will be liable for any damages directly caused by such negligence.<sup>51</sup> The fact that the gates at a railroad crossing are up and no flagman is stationed there does not relieve one crossing the tracks from

86 Ky. 578, 9 Ky. L. Rep. 725, 6 S. W. 441.

48. Gulf, C. & S. F. R. Co. v. Pendery, 87 Tex. 553, 29 S. W. 1038.

49. Richmond v. Chicago & W. M. R. Co., 87 Mich. 374, 10 Ry. & Corp. L. J. 344, 49 Am. & Eng. R. Cas. 367, 49 N. W. 621.

50. Philadelphia & R. R. Co. v. Boyer, 97 Pa. St. 91.

51. Cincinnati St. R. Co. v. Murray, 53 Ohio St. 570, 30 L. R. A. 508, 35 Ohio L. J. 22, 42 N. E. 596; Cin-

cinnati & H. Elec. St. R. Co. v. Cincinnati, H. & I. R. Co., 12 Ohio C. D. 113; Toledo Consol. St. R. Co. v. Fuller, 9 Ohio C. D. 123, 17 Ohio C. C. 562, to comply with the statute requiring that a street railroad company, whose line crosses that of a steam railroad, shall cause its cars to come to a full stop not nearer than ten feet from the crossing, the horses drawing the car must be stopped before reaching the ten-foot limit.

the duty of care proportioned to the surroundings and situation.<sup>52</sup> An attempt by the driver of a street car to cross a railroad when a train was so near that the least delay would probably lead to an accident may constitute negligence, even though he would have got across safely except for the unanticipated and wrongful act of a gatekeeper in lowering the gate.<sup>53</sup> The motorman of a street car is guilty of such negligence as will prevent a recovery for his death by failing to stop his car before attempting to cross a railroad track, when he saw or by ordinary care could have seen a train approaching, although the conductor of the car with whom he had arranged to signal him if the car could safely cross failed to give the signal.<sup>54</sup> Where defendant operated a surface steam railroad used for switching purposes only, a train which was backed upon the crossing where an electric railroad intersected it, and collided with the car on which plaintiff was motorman, he having been employed in the service two years and having seen the train standing on the track when he was approaching the crossing at a rate of twelve miles an hour, but not checking the speed of the car until within 100 or 125 feet, when he was unable to stop it because of the slippery condition of the car track, it was held that he was chargeable with contributory negligence.<sup>55</sup> A railroad company is not, as matter of law, relieved from liability for the death of a motorman of an electric car by collision with a train of such company through the latter's negligence, because of the negligence of the conductor of the electric car, who had gone on the track to look for a train, in signaling to the motorman to

**52.** *Walker v. Kinnare*, 76 Fed. 101; *Ross v. Delaware, L. & W. R. Co.*, 12 N. J. L. J. 235; *Merrigan v. Boston & A. R. Co.*, 154 Mass. 189, 28 N. E. 149; *Whalen v. New York Cent. & H. R. R. Co.*, 58 Hun (N. Y.) 431, 12 N. Y. Supp. 527; *McGrath v. N. Y. Cent., etc., R. Co.*, 59 N. Y. 468, and cases cited; *Hooper v. Boston & M. R. Co.*, 81 Me. 260, 17 Atl. 64.

**53.** *Washington & G. R. Co. v.*

*Hickey*, 166 U. S. 521, 41 L. ed. 1101, 17 S. Ct. 661.

**54.** *Martus v. Delaware, L. & W. R. Co.*, 36 N. Y. Supp. 417, 15 Misc. Rep. (N. Y.) 248.

**55.** *Einsfield v. Niagara Junction Ry. Co.*, 49 App. Div. (N. Y.) 470, 63 N. Y. Supp. 563. A steam railroad company is liable for injuries inflicted through its negligence on a street car passenger, by a collision with a street car, though the acci-

cross, where there was no particular arrangement between the two as to the method to be employed in looking for trains, and the motorman of the electric car is not, as matter of law, guilty of contributory negligence in attempting to cross the railroad track in front of an approaching train, after having stopped twenty-five or thirty feet away and looked and listened for a train without seeing or hearing one, and after having been signaled to cross by the conductor of his car who had gone upon the railroad track to look for a train.<sup>56</sup> When a gate provided at a railroad crossing is open, a traveler has a right to presume that it is safe to cross, in the absence of knowledge to the contrary. Negligence in attempting to cross a railroad track without the usual precautions, where a gate is open and a person in the gatekeeper's place makes a signal to the traveler the meaning of which is in dispute, is a question for the jury.<sup>57</sup> In the absence of statute or municipal regulation a street railroad company is not bound to maintain a watchman, flagman, or guard at a crossing by its line of railroad tracks.<sup>58</sup> The fact that a street car driver has been directed by the company to obey the signal of a flagman employed by the steam railroad company at a railroad crossing and governs the movement of his car accordingly at that place, does not convert

dent would not have happened but for the contributing negligence of the employees of the street railway company. *Chicago & E. I. R. Co. v. Hines*, 183 Ill. 482, 56 N. E. 177.

**56.** *Harper v. Delaware, L. & W. R. Co.*, 22 App. Div. (N. Y.) 273, 47 N. Y. Supp. 933.

**57.** *Evans v. Lake Shore & M. S. R. Co.*, 88 Mich. 442, 50 N. W. 386, 14 L. R. A. 223, 11 Ry. & Corp. L. J. 45; *Whelan v. New York, L. E. & W. R. Co.*, 38 Fed. 15, a street car driver who sees a gate at a railroad crossing open has a right to suppose that the track is clear and that it is safe to cross; *Minneapolis St. Ry. Co. v.*

*Chicago, M. & St. P. R. Co.*, 33 Minn. 62, 19 Am. & Eng. R. Cas. 362, holding that the driver of a street car who approached a steam railroad crossing, with which he was perfectly familiar, at a good rate of speed to within twenty-five feet of the track, when he attempted to stop on seeing an approaching train, but the momentum of his car was such that it ran upon the track and was struck by the train, was guilty of contributory negligence, precluding recovery for an injury either to himself or his employer.

**58.** *Jacquín v. Grand Ave. Cable Co.*, 57 Mo. App. 320.

the flagman into an agent of the street railroad company so as to make the latter responsible for his negligence.<sup>59</sup>

§ 399. **Collisions with other cars or trains.** — The meeting while in rapid motion of two trains of a street railroad company, at a crowded street crossing in a great city, may render the company liable for injury to a person caught between them and injured.<sup>60</sup> Where two street cars meet in a head-on collision on a single track, in the absence of other evidence, negligence must be assumed in the employees operating the cars, and hence in their employers.<sup>61</sup> In an action by a passenger on a street car for injuries sustained by a collision between that car and one upon an intersecting line operated by another company, a presumption of negligence arises from the accident itself as to the company upon whose car the plaintiff was a passenger, but not as to the other company.<sup>62</sup> The rule, *res ipsa loquitur*, applies also to a case where a street car collides with another which is being shifted from one track to another at a terminal point of a road at the foot of a descending grade, the track being covered to some extent with snow, but the burden of proof on the whole case continues with the plaintiff.<sup>63</sup> A street car company cannot avoid liability for the neglect of its duty to a passenger of another company whose line crosses its own, because the other company was also neglectful of its duties. It owes, however, to such passenger the duty only of exercising ordinary care.<sup>64</sup> Thus, the fact that the motorman of an electric car was negligent in failing to stop his car in time to avoid a col-

59. Chicago St. R. Co. v. Volk, 45 Ill. 175.

60. West Chicago St. R. Co. v. Annis, 62 Ill. App. 180.

61. Peterson v. Seattle Trac. Co., 23 Wash. 615, 63 Pac. 539; *affd.*, 65 Pac. 543.

62. Loudoun v. Eighth Ave. R. Co., 162 N. Y. 380, 56 N. E. 988, distinguishing Falke v. Third Ave. R. Co., 38 App. Div. (N. Y.) 49, 55 N. Y. Supp. 984; Volkmar v. Manhattan

Ry. Co., 134 N. Y. 418, 31 N. E. 870; Hogan v. Manhattan Ry. Co., 149 N. Y. 23, 43 N. E. 403.

See sections 342-345, *ante*, herein, as to collisions.

63. Kay v. Metropolitan St. R. Co., 163 N. Y. 147, 57 N. E. 751; *revd.* 29 App. Div. (N. Y.) 466, 51 N. Y. Supp. 724.

64. O'Rourke v. Lindell R. Co., 142 Mo. 342, 9 Am. & Eng. R. Cas. N. S. 675, 44 S. W. 254.

lision with a cable car at the intersection of the two lines, does not relieve the cable car company from liability for injury to a passenger in the electric car, when a contributory and proximate cause of the collision was the negligence of a watchman at the crossing employed by the companies jointly in signaling both cars to approach.<sup>65</sup> A street railroad company, whose car collides with a car of another company at a crossing at which the latter company had the right of way, is liable for an injury to a passenger on such latter car.<sup>66</sup> In the absence of any right of precedence, by usage or otherwise, at the intersection of two street railway tracks, cars of the different companies stand on the footing of equality, each lawfully using the public street and each owing to the other the duty of exercising reasonable care while doing so.<sup>67</sup> Failure of the motorman or driver of a street car to comply with a city ordinance as to the right of way as between the cars of companies whose tracks cross each other is not necessarily negligence *per se*, it is merely evidence of negligence.<sup>68</sup> A motorman who has already made the stop required by a city ordinance at a street intersection, at least twenty feet from the crossing of another railway, and attempts to cross when an approaching car on the other railway is from 150 to 200 feet away, and also required by ordinance to stop, is not guilty of contributory negligence, if the other car fails to stop, and he is injured in colliding with it.<sup>69</sup> The negligence of a street car driver in respect to his conduct to his employer does not constitute contributory negligence on his part precluding recovery for personal injuries received from the car of another company striking his own, where his negligence had ceased and a condition of affairs quite disconnected therefrom existed at the time of the collision.<sup>70</sup> Though a corporation was

65. Taylor v. Grand Ave. R. Co., 137 Mo. 363, 39 S. W. 88.

66. Loudoun v. Eighth Ave. R. Co., 16 App. Div. (N. Y.) 152, 44 N. Y. Supp. 742.

67. Metropolitan St. R. Co. v. Kennedy, (C. C. A., 2d C.) 51 U. S. App. 503, 82 Fed. 158.

68. Connor v. Electric Trac. Co., 173 Pa. St. 602, 38 W. N. C. 12, 34 Atl. 238.

69. Becker v. Detroit Citizens' St. R. Co., 121 Mich. 580, 80 N. W. 581.

70. Tyler v. Third Ave. R. Co., 41 N. Y. Supp. 523, 18 Misc. Rep. (N. Y.) 165, where the driver of a horse

chartered to operate street cars by animal power, and actually operated them by an underground cable, in excess of its powers, it was not liable for a collision, merely because of the fact that the act was *ultra vires*, without a showing of negligence.<sup>71</sup>

§ 400. **Collisions with vehicles.**—The cars of street railroads have a preference in the streets, but they must be managed with due care so as not to negligently injure pedestrians or persons traveling in the streets by other means of conveyance.<sup>72</sup> The street railroad company is bound to use ordinary care, or that degree of care which a person of ordinary prudence acting under similar circumstances would use, to avoid collisions with other vehicles.<sup>73</sup> Travelers upon public streets, although having the right to drive over the tracks of a street railroad company, are bound also to the exercise of ordinary care in doing so, and to look for approaching cars before attempting to pass.<sup>74</sup> It has been held that the duties of street railway companies and drivers of vehicles to use vigilance in looking out for collisions are reciprocal, and that the company is bound to exercise at least as much care as the owners of the vehicles.<sup>75</sup> It is the duty of the drivers of

car was delayed at a crossing by another car, so that the rear of the car he was driving overhung an intersecting track and was caught by a cable car running thereon.

71. *Chicago Gen. Ry. Co. v. Chicago City Ry. Co.*, 87 Ill. App. 17; *affd.*, 186 Ill. 219, 57 N. E. 822.

72. *Fenton v. Second Ave. R. Co.*, 126 N. Y. 625, 30 St. Rep. (N. Y.) 385, 26 N. E. 967, and cases cited under sections 387-390, *ante*.

73. *O'Leary v. Brockton St. Ry. Co.*, 177 Mass. 187, 58 N. E. 585; *McGary v. West Chicago St. R. Co.*, 85 Ill. App. 610; *Reardon v. Third Ave. R. Co.*, 24 App. Div. (N. Y.) 163, 48 N. Y. Supp. 1005.

74. *Thomas v. Citizens' Pass. R. Co.*, 132 Pa. St. 504, 47 Phila. Leg.

Int. 223, 20 Pittsb. L. J. N. S. 437, 25 W. N. C. 399, 19 Atl. 286; *Citizens' R. Co. v. Holmes*, 19 Tex. Civ. App. 266, 46 S. W. 116; *Price v. Charles Warner Co.*, 1 Penn. (Del.) 462, 42 Atl. 699, one whose line of vision is unobstructed, while driving towards a street railroad track, is required to look for approaching cars in time to avoid colliding with them, and is guilty of negligence rendering his employer liable for injury to a motorman by a collision, where he does not look until it is too late to avoid the collision. See also cases cited under sections 414 *et seq.*

75. *Moore v. Charlotte Elec. St. Ry. Co.*, 128 N. C. 455, 39 S. E. 57; *Shea v. St. Paul City R. Co.*, 50 Minn. 395, 52 N. W. 902.

vehicles not to obstruct street cars unnecessarily, and to turn to one side when they meet them; but subject to this duty the operator of a car and the driver of a wagon owe reciprocal duties to use reasonable care on each side to avoid collision.<sup>76</sup> The motorman and those in charge of the car and the driver of the vehicle are each bound to use reasonable or ordinary care for their own safety and the safety of each other, and what is reasonable or ordinary care in a given case depends upon the circumstances and surroundings attending the particular case.<sup>77</sup> The driver of an ordinary

The duties of a motorman and the driver of a vehicle are reciprocal, that is, each party is bound to use ordinary care, having due regard for the rights of the other, taking into consideration the ability or inability of either party to give way to the other. *Keefe v. Seattle Electric Co.*, 55 Wash. 448, 6 St. Ry. Rep. 434, 104 Pac. 774.

**76.** *Carroll v. Connecticut Co.*, 82 Conn. 513, 6 St. Ry. Rep. 354, 74 Atl. 897.

**77.** *Atlantic Coast Elec. R. Co. v. Rennard*, 62 N. J. L. 773, 42 Atl. 1041, 6 Am. Neg. Rep. 125; *Read v. Brooklyn Heights R. Co.*, 32 App. Div. (N. Y.) 503, 53 N. Y. Supp. 209. Where a motorman operating a street car, after having seen plaintiff on the track, attempting to move a balky horse, continued to run his car at a rate of speed prohibited by a city ordinance, and made no effort to stop or check the car, which came into collision with the vehicle, he was guilty of both common-law negligence and of a violation of an ordinance requiring motormen to keep a vigilant watch for obstructions. *Meyers v. St. Louis Transit Co.*, 73 Mo. App. 363, 73 S. W. 379.

**Where plaintiff was unloading a piano from a wagon, and**

waited for two street cars to pass, and then backed his wagon against the curb with the horse standing on the tracks, and sent a man down the street to signal any car that might approach; one came, without giving any warning, at an unusual rate of speed, and, although the motorman had an unobstructed view for three or four squares, and was given a notice to stop, he struck the horse and wagon, injuring plaintiff, it was held that a verdict for plaintiff should be sustained. *McFarland v. Consol. Trac. Co.*, 204 Pa. St. 423, 54 Atl. 308.

**Where plaintiff's wife was struck** by one of defendant's cars while driving across its tracks; the car was running on a down grade, and was some 250 feet distant when plaintiff's wife started to cross the track; the motorman allowed the car to run of its own momentum and did not have it under control, although he knew the street was crowded, and saw plaintiff's wife; and he made no effort to stop the car until it struck her carriage, which was hindered from crossing by a team passing immediately in front of it, it was held that the facts showed negligence. *Dallas Consol. Elec. St. Ry. Co. v. Illo*, (Tex. Civ. App.) 73 S. W. 1076.

vehicle can proceed over a street railway in the face of an approaching car only when he has reasonable ground for believing that he can pass in safety, if both he and those in charge of the car act with reasonable regard to the rights of others.<sup>78</sup> Generally speaking, the motorman, in charge of an electric car running in a public street, is bound to notice what vehicles ahead of him and near the track are doing, and if he sees one going on the track, or crossing the track immediately or a short distance in front of the car, or going so near to the track as to be in danger of being struck by his car, to warn the driver of such vehicle, and so far as he is able, to arrest the progress of his car, and, if necessary, stop it, for the purpose of preventing a collision, irrespective of the question whether or not the driver of the vehicle is guilty of contributory negligence.<sup>79</sup> It is the duty of a motorman in charge of an electric car, moving it up a narrow street, to guard against running it upon vehicles on the track directly in front and in full view of him. He should exercise the greatest prudence and caution to avoid inflicting injury. He has the vantage ground over the parties in front, in knowing the exact situation and condition of affairs ahead of him. He would have no right to take

**A street car company is liable** if the rider of a horse was thrown from the horse, not by the contact of the horse with the car, but by the fright of the horse, if the injuries sustained were caused by the negligence of the servants of the railway company in running the car against the horse. *Danville Railway & Electric Co. v. Hodnett*, 101 Va. 361, 43 S. E. 606.

**78.** *Indianapolis St. Ry. Co. v. Bolin*, 39 Ind. App. 169, 5 St. Ry. Rep. 192, 78 N. E. 210.

**79.** *South Chicago City Ry. Co. v. Kinnare*, 96 Ill. App. 210; *Bruss v. Metropolitan St. Ry. Co.*, 66 App. Div. (N. Y.) 554, 73 N. Y. Supp. 256; *Smith v. Met. St. Ry. Co.*, 66 App. Div. (N. Y.) 600, 73 N. Y.

Supp. 254; *Kennedy v. Third Ave. R. Co.*, 31 App. Div. (N. Y.) 30, 52 N. Y. Supp. 551; *Lawson v. Met. St. Ry. Co.*, 40 App. Div. (N. Y.) 307, 57 N. Y. Supp. 997; *affd.*, 166 N. Y. 589; *Hergert v. Union Ry. Co.*, 25 App. Div. (N. Y.) 218, 49 N. Y. Supp. 307; *Mowbray v. Brooklyn Heights R. Co.*, 59 App. Div. (N. Y.) 239, 69 N. Y. Supp. 435; *Blate v. Third Ave. R. Co.*, 44 App. Div. (N. Y.) 163, 60 N. Y. Supp. 732; *Weidinger v. Third Ave. R. Co.*, 40 App. Div. (N. Y.) 197, 57 N. Y. Supp. 851; *Flannagan v. St. Paul City R. Co.*, 68 Minn. 300, 71 N. W. 379; *Devine v. Brooklyn Heights R. Co.*, 34 App. Div. (N. Y.) 248, 54 N. Y. Supp. 627; *Baltimore Trac. Co. v. Appel*, 80 Md. 603, 31 Atl. 964.

advantage of even tardy action on the part of a driver of a wagon in removing it from the track, to run into and crush it. He should use every exertion to save the situation and enable the vehicle to be placed in a position of safety.<sup>80</sup> On the other hand, the driver of a vehicle in a public street traversed by a street railroad is bound to take notice of the fact that the street cars run in fixed tracks, and it is, therefore, impossible for the driver or motorman to turn out to avoid collision with an object on the tracks; that the only means of avoiding collision is by stopping the car, and that this cannot be done instantly. His right to drive on the street car tracks is subject to the duty of exercising due care to avoid any undue interference with the rights of the street car company, and to avoid a collision, and he must, therefore, use proper care and prudence in going on or across the railroad tracks.<sup>81</sup> The motorman is not bound to apprehend that a vehicle proceeding on a line parallel to the track and at a safe distance from him will, other than at a crossing or in the immediate vicinity of one, diverge from its course and go on the track or so near to it as to be struck by his car,<sup>82</sup> and he has a right to assume that a person driving on the tracks ahead of the car will pull out of the track, or that one about to turn upon the track will desist from so doing, where the gong is sounded, and there is nothing to indicate that he does not hear it, or that he will not make way for the car; and he is only bound, as an ordinarily careful man, to exert efforts to stop his car, after he sees that his warning is unheeded.<sup>83</sup> The driver of a vehicle on the street has a right to

**80.** *Weissshaus v. New Orleans Ry. & L. Co.*, 124 La. 549, 6 St. Ry. Rep. 472, 50 So. 540.

**81.** *West Chicago St. R. Co. v. Levy*, 82 Ill. App. 202, 31 Chic. Leg. N. 336; *North Chicago St. R. Co. v. Zeiger*, 78 Ill. App. 463; *Seik v. Toledo Consol. St. R. Co.*, 16 Ohio C. C. 393, 9 Ohio C. D. 51; *Maxwell v. Wilmington City Ry. Co.*, 1 Marv. (Del.) 199, 40 Atl. 945; *Stanley v. Cedar Rapids & M. & C. Co.*, 119 Iowa 526,

93 N. W. 489; *Honick v. Metropolitan St. Ry. Co.*, 66 Kan. 124, 71 Pac. 265, *Burns v. Metropolitan St. Ry. Co.*, 66 Kan. 188, 71 Pac. 244.

**82.** *South Chicago City Ry. Co. v. Kinnare*, 96 Ill. App. 210; *Knoll v. Third Ave. R. Co.*, 168 N. Y. 592, 60 N. E. 1113; affg. 46 App. Div. (N. Y.) 527, 62 N. Y. Supp. 16.

**83.** *Siek v. Toledo Consol. St. R. Co.*, 16 Ohio C. C. 393, 9 Ohio C. D. 51; *Cawley v. La Crosse City Co.*,

assume that the persons who are operating street cars are doing so with a due regard to the rights of himself and others, and that they will exercise ordinary care and prudence, and will not run their cars in such a way as to endanger him.<sup>84</sup> The street car has the superior right of way over its track where the car and a vehicle are traversing the same street, but this superior right does not authorize those in charge of the street car to wilfully or negligently injure one who refuses to recognize it.<sup>85</sup> At street crossings neither has a superior right to the other, but their rights are equal and the right of each must be exercised with due regard to the right of the other.<sup>86</sup> If either party fail to exercise its rights

106 Wis. 239, 82 N. W. 297; *Hart v. Cedar Rapids & M. C. Ry. Co.*, 109 Iowa 631, 80 N. W. 662, verdict for plaintiff sustained where the evidence tended to show that, had certain signals been given, they would have been heard and the accident averted; that, had the car been the customary distance behind the preceding car, the driver of a covered carriage would have seen it when he looked; and that, had the motorman used reasonable diligence after he discovered plaintiff's danger, he could have averted the injury; *Morrissey v. Bridgeport Trac. Co.*, 68 Conn. 215, 35 Atl. 1126; *White v. Worcester Consol. St. R. Co.*, 167 Mass. 43, 44 N. E. 1052, 6 Am. Electl. Cas. 498, motorman not justified in such assumptions under all circumstances.

**84.** *Bertsch v. Met. St. Ry. Co.*, 68 App. Div. (N. Y.) 228, 74 N. Y. Supp. 238; *Mowbray v. Brooklyn Heights R. Co.*, 59 App. Div. (N. Y.) 239, 69 N. Y. Supp. 435.

**85.** See cases cited generally under section 13. *Lamb v. St. Louis, etc., R. Co.*, 33 Mo. App. 489; *Liddy v. St. Louis R. Co.*, 40 Mo. 506; *Ryberg v. Portland Cable R. Co.*, 22 Oreg. 224,

29 Pac. 614, where the plaintiff turned on the track suddenly to avoid an obstacle placed in the street by the car company; *Gallagher v. Coney Island, etc., R. Co.*, 4 N. Y. Supp. 870, the driver of a street car, who sees a carriage crossing the tracks in front of him on a walk, is not justified in going ahead, trusting that the carriage driver will get out of the way; he is not relieved from the duty to use ordinary care to avoid a collision by the fact that the carriage driver can turn in any direction, and thus avoid the car, which is confined to its tracks; *Berke v. Twenty-Third St. R. Co.*, 4 N. Y. Supp. 905; *Lyman v. Union R. Co.*, 114 Mass. 83; *Swain v. Fourteenth St. R. Co.*, 93 Cal. 179, 28 Pac. 829, where a car company was held negligent in causing a collision, where a police officer with his patrol wagon carrying an injured man was driving along the track, saw the car coming, halloed to the driver, tried to turn out, but had to do so slowly on account of the sick man, and was run into because the driver of the car was not looking ahead and failed to observe him.

**86.** *Reilly v. Met. St. Ry. Co.*, 30

in a reasonable and careful manner, to use that care which a man of ordinary prudence would have exercised under the circumstances, he is guilty of negligence and becomes liable for an injury resulting as the proximate cause of his want of care, unless the injured party by his negligence contributed to the injury.<sup>87</sup> These general rules and principles have been applied by the courts to the various circumstances of numerous cases, some of which are referred to here and others in other sections of this work.<sup>88</sup> One nearing a street railway crossing, the view of which is impeded by vehicles, has the right to cross if, proceeding at a rate of speed which under the circumstances of the time and locality is reasonable, he would reach the point of crossing in time to safely go on the tracks in advance of an approaching electric car, the latter being sufficiently distant to be checked and, if need be, stopped before reaching him.<sup>89</sup> A driver may, without negligence, attempt to cross a street railway track without waiting for the passage of a cable car which is in sight, if there is a reasonable opportunity to cross in front of the car, although it may be necessary for the gripman to slacken the speed of the car.<sup>90</sup> The duty of using reasonable care to avoid collisions rests upon all travelers alike, the trolley car as well as the ice wagon. Under some circumstances it would not be unreasonable for the driver of a vehicle to deliberately drive upon a track under conditions, which would compel the motorman of an electric car to abate its speed in order

Misc. Rep. (N. Y.) 110, 61 N. Y. Supp. 785; *Petri v. Third Ave. R. Co.*, 30 Misc. Rep. (N. Y.) 254; 63 N. Y. Supp. 315, and cases cited generally under section 388, *ante*.

**87.** *Reed v. Met. St. Ry. Co.*, 58 App. Div. (N. Y.) 87, 68 N. Y. Supp. 539; *Saffer v. Westchester Elec. R. Co.*, 49 N. Y. Supp. 998, 22 Misc. Rep. (N. Y.) 555, where an electric car was run on plaintiff's track when it was fixed in a hole in the bed of defendant's track, on a clear night, and notwithstanding plaintiff's warning shouts; *Mason v. Met. St. Ry.*

*Co.*, 30 Misc. Rep. (N. Y.) 108, 61 N. Y. Supp. 789; *Hamilton v. Third Ave. R. Co.*, 6 Misc. Rep. (N. Y.) 382, 26 N. Y. Supp. 754; *Vitelli v. Nassau Elec. R. Co.*, 53 App. Div. (N. Y.) 639, 65 N. Y. Supp. 1027.

**88.** See the various sections throughout this chapter.

**89.** *New Jersey Elec. R. Co. v. Miller*, 59 N. J. L. (30 Vroom) 423, 36 Atl. 85, 6 Am. & Eng. R. Cas. N. S. 519.

**90.** *Kennedy v. Third Ave. R. Co.*, 31 App. Div. (N. Y.) 30, 52 N. Y. Supp. 551.

to avoid peril of injury; under other circumstances such conduct might be grossly negligent.<sup>91</sup> Where there was a rule of the street car company prohibiting two cars from using a narrow bridge simultaneously, and a violation of such rule caused a collision between a car and an automobile, such violation was some evidence of negligence in the operation of such car, especially where the automobile stopped after the car became visible, but the motorman was unable to stop the car.<sup>92</sup>

**§ 401. Collisions with vehicles continued — When liable.** — A street railroad company is liable for an injury to a horse and buggy struck by one of its cars at the intersection of a street and an avenue along which the railroad runs, caused by running the car at so great a rate of speed as to be unable to avoid injury to one crossing the track at this point.<sup>93</sup> A street railway company was not free from negligence in a collision between its car and a vehicle crossing its track, if the exercise of reasonable care and prudence required that the car should have been run at a slower rate than it was running, or should have been held in better control, as it ran down a hill, or that its motorman should have sanded the tracks by the means provided for that purpose.<sup>94</sup> Where a collision occurred between a street car and an automobile on a much traveled bridge upon which there were double street car tracks, and the bridge was so narrow that it was impossible for a vehicle to pass between the street car tracks and the guard rail so as to avoid a street car, due care required that a motorman of one car which was passing another upon such bridge should keep his car sufficiently under control to avoid striking any vehicle that might turn out from behind the passing car.<sup>95</sup> It is not necessarily negligent, as a matter of law, to leave a horse unhitched in

**91.** *Jedrey v. Boston & U. St. Ry. Co.*, 198 Mass. 232, 6 St. Ry. Rep. 754, 84 N. E. 316.

**92.** *Chadbourn v. Springfield St. Ry. Co.*, 199 Mass. 574, 6 St. Ry. Rep. 625, 85 N. E. 737.

**93.** *Birmingham Ry. & Elec. Co.*

*v. City Stable Co.*, 119 Ala. 615, 24 So. 558.

**94.** *Lawler v. Hartford St. R. Co.*, 72 Conn. 74, 43 Atl. 545.

**95.** *Chadbourn v. Springfield St. Ry. Co.*, 199 Mass. 574, 6 St. Ry. Rep. 625, 85 N. E. 737.

a street. So where the plaintiff left his horse unhitched while he went into a house to deliver groceries, and the horse was a large, slow animal of quiet disposition, which has been used by the plaintiff for four or five months in delivering groceries from house to house and had regularly been so left by the plaintiff, and was not afraid of electric cars, and the driver when he came out found the horse and wagon gone, and notified the conductor of the car that he might have strayed upon the track, the company was held liable.<sup>96</sup> A street railway company is liable for an injury to a horse and wagon left standing in a city street so close to the street railway track as to be struck by a passing car, when the motorman either saw the position of the wagon, or could have seen it, by the use of proper care, in time to have stopped the car.<sup>97</sup> The motorman of an electric car is negligent where he fails to make any effort to avoid a collision with a person driving in front of the car, although such person is negligent in failing to observe the approach of the car, when the motorman knows of his danger.<sup>98</sup> And while as a general proposition a street car has a paramount right between the places where streets intersect, this does not mean that the operator of a car may run down one who may lawfully be on the track. Thus, where the driver of a wagon being lawfully on the tracks was prevented from leaving them on one side by the approach of a car and on the other by deep snow, the right of way of a car on the same track approaching in his rear was not paramount.<sup>99</sup> Failure to stop a street car sixty or eighty feet away from a team at the time it starts to cross the track is negligence, where it is possible to stop it before a collision occurs.<sup>1</sup> A

**96.** *Carey v. Milford & U. St. Ry. Co.*, 193 Mass. 161, 5 St. Ry. Rep. 448, 78 N. E. 1001, distinguishing *Stacey v. Haverhill, G. & D. St. Ry. Co.*, 191 Mass. 326, 4 St. Ry. Rep. 479, 77 N. E. 714, where it appeared that the horse was sometimes fastened with a weight, but on this occasion was left for about ten minutes in a place where there was a temptation to graze.

**97.** *Higgins v. Wilmington City R. Co.*, 1 Marv. (Del.) 352, 41 Atl. 86.

**98.** *Wilkins v. Omaha & C. B. Railway & Bridge Co.*, 96 Iowa 668, 65 N. W. 987.

**99.** *Dietrich v. Brooklyn Heights R. Co.*, 123 App. Div. (N. Y.) 604, 6 St. Ry. Rep. 309, 108 N. Y. Supp. 158.

**1.** *Witzel v. Third Ave. R. Co.*, 3

motorman is not, as a matter of law, free from negligence in increasing the speed of his car after having it under full control, when a few feet behind a wagon loaded with barrels so close to the track as to be rubbed by the car in passing.<sup>2</sup> A motorman is not, as matter of law, free from negligence in failing to stop his car at once, upon seeing the wheels of a heavily-loaded wagon in front of the car slip on the track while the driver was attempting to get out of the way.<sup>3</sup> A motorman, aware of the fact that he cannot pass a loaded wagon in a narrow street without colliding with it, is guilty of gross negligence, where he attempts to pass it before the driver has had reasonable time to unload and move it.<sup>4</sup> A finding that a collision of a street car with a wagon at the intersection of two streets was caused by negligence of the motoneer, without contributory negligence of the driver, is warranted by evidence that the driver, on coming east from a point ten feet from the west crossing, saw the car coming south one hundred feet from the north crossing; that while driving the team at a "moderate trot," without lessening his speed as he approached the track, and "looking for other vehicles and pedestrians that might be on the other crossing," the wagon was struck on the hind wheel by the car; and that the motorman gave no warning of the car's approach, and made no effort to check its speed, though he saw the team as he approached the northerly crossing, and could have stopped the car within twelve feet.<sup>5</sup> In an action for injuries caused by a collision between defendant's cable car and a wagon, where the evidence would have justified the jury in finding that, as the two vehicles approached, the gripman did not check the speed of the car, but increased it, the court sustained a verdict finding defendant guilty of negligence.<sup>6</sup> Where a motorman was inside his car

Misc. Rep. (N. Y.) 561, 52 St. Rep. (N. Y.) 521, 23 N. Y. Supp. 317.

2. *Blakesley v. Consol. St. R. Co.*, 112 Mich. 63, 70 N. W. 408, 3 Detroit Leg. N. 844, 29 Chic. Leg. N. 257.

3. *Bush v. St. Josephs & B. H. St. Ry. Co.*, 113 Mich. 513, 4 Detroit Leg. N. 377, 71 N. W. 851.

4. *Holzman v. Met. St. Ry. Co.*, 64 N. Y. Supp. 1120, 31 Misc. Rep. (N. Y.) 644.

5. *Piercy v. Met. St. Ry. Co.*, 62 N. Y. Supp. 867, 30 Misc. Rep. (N. Y.) 612.

6. *Knoll v. Third Ave. R. Co.*, 168 N. Y. 592, 60 N. E. 1113; affg. 46

fixing his seat when the car rounded a curve, and it appeared that if he had been at his post he might have discovered the fright of plaintiff's team in time to have averted the collision in which plaintiff was injured, the court sustained a verdict for the plaintiff.<sup>7</sup> An electric street railroad company is liable for an injury caused by one of its cars colliding with a wagon which was being driven on the track ahead of it, where the motorman, in the exercise of ordinary care, should have seen the wagon in time to stop his car before running into it, or where it is obvious from the evidence that the car might have been stopped, by the exercise of reasonable care.<sup>8</sup> A street railway company which runs down a wagon being driven along its tracks, and plainly visible in front of the car, is guilty of negligence or wilful wrong, in the absence of any special circumstances.<sup>9</sup> Where defendant street car company purchased land leading to a summer resort, over which it laid its tracks, which were not fenced off or otherwise separated from the roadway, and which it opened for use as a public highway, though without formal dedication, and plaintiff, a passenger in a stage coach, was injured by defendant's car colliding with that vehicle, and defendant contended that its invitation to the public extended only to the use of the roadway at the side of its tracks, and that, being on its tracks, plaintiff was a trespasser, the court held that the defendant was liable, though its negligence causing the accident was not wanton, wilful, and intentional, the contention of the defendant being against public policy.<sup>10</sup> In an action for injuries to plaintiff's furniture van by being struck at night by one of defendant's cars, approaching from the rear, where the evidence

App. Div. (N. Y.) 527, 62 N. Y. Supp. 16.

7. *Montgomery v. Johnson*, 22 Ky. L. Rep. 596, 58 S. W. 476.

8. *Robinson v. Louisville R. Co.*, (Ky.) 112 Fed. 484, 50 C. C. A. 357; *Toledo Elec. St. Ry. Co. v. Westenhuber*, 22 Ohio C. C. 67, 12 Ohio C. D. 22; *Joliet R. Co. v. Eich*, 96 Ill. App. 240.

9. *Vincent v. Norton & T. Ry. Co.*,

180 Mass. 104, 61 N. E. 822; *Brachfeld v. Third Ave. R. Co.*, 60 N. Y. Supp. 988, 29 Msc. Rep. (N. Y.) 586, the fact that a person in a crowded thoroughfare drives his team on a surface railroad is no justification for the company allowing its cars to collide with the rear of his wagon.

10. *Liekens v. Staten Island M. R. Co.*, 64 App. Div. (N. Y.) 327, 72 N. Y. Supp. 162.

showed that the night was very dark and the street poorly lighted, and the condition of the street such that the van could only travel upon the tracks, and that the car was traveling at a very rapid rate of speed, it was held that the evidence warranted the court in submitting to the jury the question whether or not the speed of the car was reckless and dangerous.<sup>11</sup> Where plaintiff in an action for injury by a street car alleged wilful, wanton, or intentional misconduct, and the evidence showed that the plaintiff's horse became frightened and unmanageable and got on the track when the car was a block and a half away, and, although a person in the buggy with plaintiff hallooed to the motorman and threw up her hands, he made no effort to stop or reduce the speed of the car until after the collision, it was held that, in order to establish wantonness it is not necessary to establish an entire want of care; wantonness being the failure of one charged with a duty to exercise an honest effort in the employment of all available means to prevent injury; and that a failure to use means to avoid peril, together with indifference as to consequences, may constitute wilful misconduct, although no intent exists to cause an injury.<sup>12</sup> Where plaintiff drove into a city street on which a street railroad was operated from a cross street, in the day time, and before driving on the tracks looked in both directions for the approach of cars, and then continued his course down the track, and had driven one block from where he entered the street, when the wagon was struck from behind at a street crossing, and he was thrown out and injured, it was held that the negligence of the company was a question for the jury, and it was error to direct a verdict for defendant at the close of plaintiff's evidence.<sup>13</sup> Where plaintiff's evidence tended to show that he was

**11.** *American Storage & Mov. Co. v. St. Louis Transit Co.*, 120 Mo. App. 410, 5 St. Ry. Rep. 674, 97 S. W. 184.

**12.** *Birmingham Ry. & Elec. Co. v. Pinckard*, 124 Ala. 372, 26 So. 880; *Birmingham Ry. & Elec. Co. v. Smith*, 121 Ala. 352, 25 So. 768, but the question of wilful or intentional in-

jury should be submitted to the jury, where the tendencies of the testimony are conflicting as to whether the motorman saw and knew in ample time to avoid collision that the plaintiff was going to cross the track in such a manner as not to see the car.

**13.** *Schilling v. Met. St. Ry. Co.*,

seated in a grocery wagon, the back and sides of which were inclosed by oilcloth curtains and was driving along a certain street, each side of which was either out of repair, or incumbered with rubbish, so that the passable part of the roadway ran so close to defendant's car tracks that the wheels of plaintiff's wagon nearest the track were only about a foot from it; that while so driving along said roadway a car of defendant came up rapidly from behind, without warning, and struck plaintiff's wagon, throwing it over and seriously injuring him, it was held that a dismissal of the complaint at the close of plaintiff's testimony was error.<sup>14</sup> Contributory negligence, however, of a driver, in failing to get out of the way of a street car and not obstruct its passage, does not preclude recovery for injuries which could have been avoided by the exercise of due and proper care on the part of the employees operating the car, after seeing his perilous position.<sup>15</sup> But to render a street railway company liable for damages in such a case, notwithstanding the negligence of the driver of the vehicle, the company's servants must have failed to exercise ordinary care to avoid the collision, after actually becoming aware of the danger; and it is not sufficient that they might have observed the danger.<sup>16</sup>

§ 402. Collisions with vehicles continued — When not liable. —

A street car company is not liable for personal injuries to a driver due to the fact that his horse suddenly and without warning sprang

47 App. Div. (N. Y.) 500, 62 N. Y. Supp. 403; *Reilly v. Troy City R. Co.*, 32 App. Div. (N. Y.) 131, 52 N. Y. Supp. 611, whether it was negligence, under the circumstances of the case, for an electric car to attempt to pass a wagon, on a dark night, upon a bridge, part of which was occupied by defendant's railroad track, leaving a space of eight feet for ordinary vehicles, should have been left to the jury.

14. *Warren v. Union Ry. Co. of*

New York, 46 App. Div. (N. Y.) 517, 61 N. Y. Supp. 1009.

15. *Consol. Trac. Co. v. Haight*, 59 N. J. L. (30 Vroom) 577, 37 Atl. 135; *Cincinnati St. R. Co. v. Whitcomb*, (C. C. A., 6th C.) 66 Fed. 915, 1 Ohio Dec. Fed. 5; *Cooney v. Southern Elec. R. Co.*, 80 Mo. App. 226, 2 Mo. App. Rep. 646; *McKeon v. Steinway R. Co.*, 20 App. Div. (N. Y.) 601, 47 N. Y. Supp. 374.

16. *Siek v. Toledo Consol. St. R. Co.*, 9 Ohio C. D. 51, 16 Ohio C. C.

across the track in front of a car, making a collision unavoidable.<sup>17</sup> No negligence by a street railway company is shown where a car running at its usual speed collided with a wagon, in the absence of evidence that the driver of the car saw or could have seen the danger of collision, or that he could have prevented it when the danger became apparent, especially where the driver of the wagon pulled his horse toward the car in such a manner as to call the attention of a bystander to the danger of a collision.<sup>18</sup> And where a driver stopped and waited for the regular scheduled car to pass at a street crossing, and after it had passed started to cross and was struck by an extra car directly behind the regular one, it was held that there was no negligence on the part of the company from the fact of its running an extra car, and a judgment for defendant was affirmed.<sup>19</sup> A street railway company is not liable for injury to a covered express wagon in a collision with one of its cars, where the driver of the wagon attempted to cross the car tracks between two streets when the car was but one hundred feet distant, and, upon discovering his mistake, attempted by whipping his horse to cross in safety.<sup>20</sup> A street railway company is not liable for injuries to one who, having halted his team at a crossing to allow a car to pass, suddenly attempted to cross in front of a rapidly approaching car in plain view and distant not more than 225 feet, when the motorman vainly endeavored to arrest its speed.<sup>21</sup> A street railroad company is not liable for an injury to a horse left unhitched in a city street, where the injury was caused by the sudden backing of the wagon into the car, or where the failure to hitch the horse contributed to the accident.<sup>22</sup> A motorman of an electric car is not chargeable with negligence in colliding with a

393; *Johnson v. Stewart*, 62 Ark. 164, 34 S. W. 889. And see *North Chicago St. R. Co. v. Rodert*, 1 St. Ry. Rep. 101, and notes, 203 Ill. 413, 67 N. E. 812; affg. 105 Ill. App. 314.

**17.** *McManigal v. South Side Pass. R. Co.*, 181 Pa. St. 358, 37 Atl. 516.

**18.** *North Side St. R. Co. v. Want* (Tex.) 15 S. W. 40.

**19.** *Hatcher v. McDermot*, 103

Md. 78, 5 St. Ry. Rep. 373, 63 Atl. 214.

**20.** *Reiss v. Met. St. Ry. Co.*, 58 N. Y. Supp. 1024, 28 Misc. Rep. (N. Y.) 198.

**21.** *Hemmingway v. New Orleans City & L. R. Co.*, 50 La. Ann. 1087, 23 So. 952.

**22.** *Higgins v. Wilmington City R. Co.*, 1 Marv. (Del.) 352, 41 Atl. 86;

buggy, when it was, without warning, turned upon the track thirty or forty feet in front of the car, and the motorman immediately exercised all the means in his power to stop the car, but was unable to do so before it collided with the wagon.<sup>23</sup> The motorman of an electric car was not negligent in failing to stop his car on seeing a runaway horse approaching the track, where he had but a brief time to decide upon the proper course, and he could not stop the car after seeing the horse until it reached the middle of the street.<sup>24</sup> Where plaintiff's driver sees the approach of a street car, actionable negligence of the railway in a collision between the vehicle and the car cannot be established by proof that the motorman did not ring the gong.<sup>25</sup> Where plaintiff was driving south on the east side of a street, and when a short distance past a street intersection he turned to the west to cross the defendant's tracks, but, before doing so, looked and saw a south, but not a north-bound car, and when a little more than halfway across the east track his vehicle was struck and injured by a north-bound car, the street at the time being well lighted, and the car being lighted inside and having a headlight, and there was no evidence that the car

*McCambley v. Staten Island M. R. Co.*, 32 App. Div. (N. Y.) 346, 52 N. Y. Supp. 849; *Gilmore v. Federal St. & P. V. Pass. R. Co.*, 153 Pa. St. 31, 31 W. N. C. 507, 25 Atl. 651, nor where a person leaves his horse standing unguarded upon the track, and goes into a neighboring building; *Hoffman v. Syracuse R. T. Co.*, 50 App. Div. (N. Y.) 83, 63 N. Y. Supp. 442, injuries to team, where team was left unhitched in the street in a space ten feet wide between the track and the gutter, occasioned by the horses turning on the track as the motor approached, not actionable, though the motormen were negligent; *Winter v. Federal St. & P. V. Pass. R. Co.*, 153 Pa. St. 26, 31, 31 W. N. C. 565, 19 L. R. A. 232, 25 Atl. 1028, 23 Pittsb. L. J. N. S. 302, 4 Am.

*Electl. Cas.* 498, where a truckman obstructed the tracks with his team after dark while unloading a safe; *Coughtry v. Willamette St. R. Co.*, 21 Oreg. 245, 27 Pac. 1031, team frightened by motor, horses "danced" on the track in front of the approaching motor, recovery not allowed; *Phila. Trac. Co. v. Bernheimer*, 125 Pa. St. 615, 38 Am. & Eng. R. Cas. 487, 17 Atl. 477, a similar case.

**23.** *Kessler v. Citizens' St. R. Co.*, 20 Ind. App. 427, 50 N. E. 891.

**24.** *Phillips v. People's Pass. R. Co.*, 190 Pa. St. 222, 43 W. N. C. 531, 5 Am. Neg. Rep. 719, 42 Atl. 686.

**25.** *Williamson v. Met. St. Ry. Co.*, 60 N. Y. Supp. 477, 29 Misc. Rep. (N. Y.) 324; *Anderson v. Met. St. Ry. Co.*, 61 N. Y. Supp. 899, 30 Misc. Rep. (N. Y.) 104.

was running at an unusual or excessive speed, nor that the employees in charge of it saw plaintiff in time to stop, it was held that defendant's negligence was not shown.<sup>26</sup> Where plaintiff's son was riding one of a pair of mules attached to a wagon going from a farmhouse toward a road, when he heard a trolley car approaching, and attempted to stop the mules, but they became headstrong, and, after coming to a full stop, walked on the track directly in front of the car; the mules had never before been intractable, and the motorman had every reason to suppose that they would stop, it was held that there was no evidence of negligence on the part of the motorman.<sup>27</sup> An unexpected and sudden attempt by a person in a covered wagon to cross the track of a street railroad when a motor car was so close behind that only a few seconds elapsed before a collision does not present a question for the jury, notwithstanding one witness testifies that he thinks the motor car could have been stopped before striking the wagon.<sup>28</sup>

§ 403. **Collisions with animals.** — A dog is a species of property for the negligent killing or injury of which an action can be maintained by the owner against a street railroad company, but the company is required to use only ordinary care to prevent an accident to a dog upon its track.<sup>29</sup> A dog is not a trespasser on a street railroad track which is laid in the highway on the same level with it, and a motorman cannot rely upon the quickness and celerity of a dog to absolve himself from all duty and care to prevent running over him with an electric car.<sup>30</sup> Where a dog on a

**26.** *McFarland v. Third Ave. R. Co.*, 60 N. Y. Supp. 273, 29 Misc. Rep. (N. Y.) 121, citing *Adolph v. Central Park, etc., R. Co.*, 76 N. Y. 530; *Fenton v. Second Ave. R. Co.*, 126 N. Y. 625, 26 N. E. 967; *Rosenblatt v. Brooklyn Heights R. Co.*, 26 App. Div. (N. Y.) 600, 50 N. Y. Supp. 333.

**27.** *Harmon v. Pennsylvania Trac. Co.*, 200 Pa. St. 311, 49 Atl. 755.

**28.** *Fritz v. Detroit Citizens' St.*

*R. Co.*, 105 Mich. 50, 62 N. W. 1007, 2 Detroit Leg. N. 19, 5 Am. Electl. Cas. 480.

**29.** *Furness v. Union R. Co.*, 4 Pa. Dist. Rep. 784, 8 Kulp (Pa.) 103, 1 Lack. Leg. N. 332, 13 Lanc. Leg. Rev. 72; *Louisville & N. R. Co. v. Fitzpatrick*, 129 Ala. 322, 29 So. 859.

**30.** *Citizens' R. T. Co. v. Dew*, 100 Tenn. 317, 45 S. W. 790, 40 L. R. A. 518.

street car track was seen in time by the servants in charge of the car to have slackened the speed of the car, and so avoided injury to the dog, and no efforts were made in that direction by such servants, lack of effort will constitute negligence for which a recovery may be had.<sup>31</sup> So the company was held liable for the killing of a dog which continued to run on the track in front of the car, it appearing that although the bell was ringing all the time, no action was taken to get the car in hand so as to permit of promptly stopping it until it was nearly on the dog, when there was a vigorous effort to stop it, which came too late.<sup>32</sup> And where dogs are engaged in fighting upon street railway tracks, and are apparently oblivious to an approaching car, the motorman upon discovering them in a position of peril is required to exercise reasonable care by using proper signals or checking the speed of his car, to avoid injuring them.<sup>33</sup> In an action against an electric street railroad company for killing a dog, it was held that it was not contributory negligence on the part of the owner, the superintendent of a cemetery, to use the road the railway ran through for a passage of his watch dogs, employed in guarding the cemetery, although the highway on each side of the railway was banked with snow, and that, even if the dog was trespassing on the track, it was the duty of the motorman, if there was danger of running the dog down, to slacken speed, and it was for the jury to determine whether in the exercise of reasonable vigilance he might have discovered the danger in time to avert it.<sup>34</sup> Where, however, the only evidence on the part of the plaintiff to account for the accident, which happened in the middle of a block, was that the motor was running faster than usual, it was held that a judgment for plaintiff should be reversed.<sup>35</sup> In Georgia it is held that a suit

**31.** *West Chicago St. Ry. Co. v. Klecka*, 94 Ill. App. 346.

**32.** *Jackson Electric Ry., L. & P. Co. v. Waycaster*, 92 Miss. 816, 6 St. Ry. Rep. 846, 46 So. 135.

**33.** *Harper v. St. Paul City Ry. Co.*, 99 Minn. 253, 5 St. Ry. Rep. 522, 109 N. W. 227.

**34.** *Meisch v. Rochester Elec. Ry. Co.*, 72 Hun (N. Y.) 604, 55 St. Rep. (N. Y.) 146, 25 N. Y. Supp. 244, 4 Am. Electl. Cas. 520.

**35.** *Dettmers v. Brooklyn Heights R. Co.*, 22 App. Div. (N. Y.) 488, 48 N. Y. Supp. 23.

cannot be maintained against a railroad company for the negligent killing of a dog, a dog not being treated as property to the same extent as other domestic animals are treated.<sup>36</sup> In an action brought against an electric railway company for damages caused by the death of a cow killed upon the tracks of the company, it was contended that from the evidence of the plaintiff himself he was guilty of contributory negligence, since it was not shown that before driving the cow upon the tracks he looked for an approaching car, but the evidence was held sufficient to show a lack of contributory negligence.<sup>37</sup> Where the plaintiff's cow was run over by one of defendant's cars and killed, and it appeared that the cow was on the track in plain view of the motorman for a distance of more than 150 feet; that the car was running down grade at great speed, and the speed was not lessened until after the collision, and that the car ran nearly one hundred feet after it struck the cow, and the negligence of the owner in permitting it to be at large was admitted; it was held that to warrant the jury in finding for the plaintiff, notwithstanding his negligence, it should be inferred from the evidence that the motorman could have prevented the accident, by stopping the car or lessening its speed, after he had discovered the cow on the track, by the use of the appliances at hand; that in the absence of evidence the jury could not assume that the car could be stopped within a distance of 150 feet by the use of ordinary appliances.<sup>38</sup>

**36.** *Strong v. Georgia Ry. & Electric Co.*, 1 St. Ry. Rep. 69, (Ga.) 45 S. E. 366; *Jennison v. Southwestern R. Co.*, 75 Ga. 444, 58 Am. Rep. 476.

**37.** *Ensley v. Detroit United Ry. Co.*, 1 St. Ry. Rep. 380, and notes (Mich.) 96 N. W. 34, also holding that where the franchise of the defendant contained a requirement that its cars should be properly lighted in the night-time, whether standing or running, a charge to the jury to the effect that the defendant would be liable for any failure to use reasonable care in the lighting of its car

in front so as to give a fair and reasonable notice to persons desiring to use the highway next to the track; and that the liability for a violation of the franchise does not differ greatly from that of the ordinary liability of the defendant; and that it was for the jury to determine whether the lights used upon the car at the time of the accident were sufficient to give the plaintiff reasonable notice of the approach of the car, is an instruction which fairly presents the question to the jury.

**38.** *Kotila v. Houghton County St.*

§ 404. **Injuries to persons on or near tracks.** — Though a motorman is not aware of the peril of one on the track in time to avoid injuring him, yet the company is liable if the motorman was guilty of wantonness in running his car over a crossing at the time and under the circumstances.<sup>39</sup> The motorman must, in all such cases, do what he can to prevent the accident.<sup>40</sup> It is the duty of a street railway company to use reasonable care to see that it does not injure persons passing over its tracks, to give warning of the approach of cars when persons are seen about to cross the track, and to keep its cars under reasonable control at such times.<sup>41</sup> Where a motorman in a sudden emergency uses his best judgment to extricate the plaintiff, who has been run down and is under the car, but his actions result in further injury to the plaintiff, the latter cannot recover on account of these actions; there being no negligence shown.<sup>42</sup> Whenever a car is rapidly approaching a point where it is apparent that the danger of injury to the public will be materially lessened by sounding the bell, it is the duty of the motorman to do so.<sup>43</sup> But the failure of a motorman to ring a bell on approaching a crossing, where a car on the other track had just discharged passengers, would not justify a finding of negligence, where his car was immediately behind a truck, and there was no reason for him to suppose that any one would step

Ry. Co., 1 St. Ry. Rep. 397, and notes, 134 Mich. 314, 96 N. W. 437.

**39.** Birmingham Ry. & Elec. Co. v. Jackson, 136 Ala. 279, 34 So. 994. If the motorman was not guilty of gross negligence or wantonness under such circumstances, plaintiff is not entitled to recover. Ryan v. La Crosse City Ry. Co., 108 Wis. 122, 83 N. W. 770.

**40.** Baltimore City Pass. Ry. Co. v. Cooney, 87 Md. 261, 39 Atl. 859; North Baltimore Pass. Ry. Co. v. Arnreich, 78 Md. 589, 28 Atl. 809; Berry v. Burlington Ry. & Light Co., 119 Iowa 62, 93 N. W. 68, 95 N. W. 229; Smith v. Citizens' Ry. Co., 52

Mo. App. 36; Hickman v. Union Depot R. Co., 47 Mo. App. 65; Bergman v. St. Louis, etc., R. Co., 88 Mo. 678.

**41.** Peterson v. Minneapolis St. Ry. Co., 1 St. Ry. Rep. 419, 90 Minn. 52, 95 N. W. 751.

**42.** Trussell v. United Tract. Co., (Pa.) 31 Pittsb. Leg. J. N. S. 15.

**43.** Murphy v. Derby St. Ry. Co., 73 Conn. 249, 47 Atl. 120; Hall v. Ogden City R. Co., 13 Utah 243, 44 Pac. 1046, 4 Am. & Eng. R. Cas. N. S. 77; Mitchell v. Tacoma R. & M. Co., 9 Wash. 120. And see Kline v. Elec. Tract. Co., 181 Pa. St. 276, 40 W. N. C. 337, 37 Atl. 522.

in front of the car when it was plainly visible.<sup>44</sup> The rule that a railroad company is not liable to trespassers on its tracks for its negligence in employing servants, or in failing to keep machinery in repair, has no application to the liability of a street railroad company for injuries occurring on its tracks, since every one has a right to the streets.<sup>45</sup> When a motorman sees a person approaching the track, he has a right to assume that such person will stop before reaching it, and is not bound to stop his car or slacken its speed in anticipation of such person coming upon the track.<sup>46</sup> A man on a bicycle, in a public street occupied by an electric railway, is bound to exercise ordinary care for his own safety, and the employees of the railroad are bound to use the same degree of care not to injure him; but what each is required to do depends on the situation under which such exercise of care is demanded.<sup>47</sup> The motorman of an electric car is not bound to regulate its speed or give such warning of its approach that footmen may cross in safety at a place other than a street crossing, nor need he apprehend that a footman will put himself upon the track without first observing whether a car is approaching.<sup>48</sup> But it is his duty to take special care to have it sufficiently under control to enable him to avoid collision with aged and infirm persons on foot, whose infirmities are plainly in evidence, and who may be crossing the track at a street crossing.<sup>49</sup> Upon the question of discovered peril in a recent case where it appeared that the motorman discovered a woman about to cross the track; that she did not hear the warnings sounded by him, and he did not apply the emer-

44. *Johnson v. Third Ave. R. Co.*, 69 App. Div. (N. Y.) 247, 74 N. Y. Supp. 599.

45. *Little Rock Tract. & Elec. Co. v. Morrison*, 69 Ark. 289, 62 S. W. 1045.

As to trespassers, see section 371 herein.

46. *West Chicago St. R. Co. v. Schwartz*, 93 Ill. App. 387. And that one crossing the street will stop until the car has entirely passed. *Mc-*

*Quade v. Met. St. Ry. Co.*, 17 Misc. Rep. (N. Y.) 154, 39 N. Y. Supp. 335.

47. *South Chicago City Ry. Co. v. Kinnare*, 96 Ill. App. 210.

48. *Bethel v. Cincinnati St. R. Co.*, 15 Ohio C. C. 381, 8 Ohio C. D. 310.

49. *Haight v. Hamilton St. R. Co.*, (Div. Ct.) 29 Ont. Rep. 370.

As to infirm persons, see section 370, *ante*, herein.

gency brake until about twenty feet from her, the court said: "We think the evidence tends to show that the motorman was guilty of negligence in failing to immediately apply his emergency brake and even reverse, if need be, the power upon the car in order to stop it, when, by the exercise of reasonable care, he could have discovered that appellee did not hear his warnings and was going upon the track."<sup>50</sup> A street railway company running a car past another which is standing still, receiving or discharging passengers at the intersection of streets, must not unnecessarily expose pedestrians to the danger of collision.<sup>51</sup> A street railway company whose motorman in the presence of imminent danger has two or more lines of action open to him and chooses one of them, apparently in good faith, is not liable merely for his failing to choose what, after the result was ascertained, might seem to have been the best means of escape.<sup>52</sup> In an action to recover damages for the injury or death of a person, by reason of being run against and over by a street car, a motion for a nonsuit at the close of the plaintiff's evidence should not be granted, unless the facts presented by the evidence are such that but one conclusion could reasonably be drawn from them, and that conclusion is that no recovery can be had under the evidence.<sup>53</sup> The mere failure to warn a pedestrian crossing a street of the approach of a street car is not negligence rendering the company liable for injuries to him from being struck by the car, where he had observed its approach before attempting to cross.<sup>54</sup> A motorman of an electric car does not discharge his full duty toward one whom he sees standing on the track, by giving signals of approach, and he has no right to rely on the assumption that such person will get off the track, but

**50.** Northern Texas Traction Co. v. Thompson, 42 Tex. Civ. App. 613, 6 St. Ry. Rep. 819, 95 S. W. 708.

**51.** Consol. Tract. Co. v. Scott, 53 N. J. L. (29 Vroom) 682, 34 Atl. 1094, 33 L. R. A. 122, 55 Am. St. Rep. 620, 4 Am. & Eng. R. Cas. N. S. 371; Scott v. Third Ave. R. Co., 41 St. Rep. (N. Y.) 152, 16 N. Y. Supp.

350; Driscoll v. Market St. Cable R. Co., 97 Cal. 553.

**52.** Bishop v. Bell City St. R. Co., 92 Wis. 139, 65 N. W. 733.

**53.** Pilmer v. Boise Traction Co., 14 Idaho 327, 6 St. Ry. Rep. 514, 95 Pac. 432.

**54.** Schulman v. Houston, W. St. & P. Ferry R. Co., 15 Misc. Rep.

it is his duty to run the car with care, give the signal, and use every precaution to avoid an accident.<sup>55</sup> But he is not necessarily required to stop the car upon seeing a person on the track.<sup>56</sup>

**§ 405. Injuries to persons on or near tracks — When liable. —**

Evidence that a cable car approached a street crossing at a high rate of speed without sounding a gong, though a woman struck by the car was approaching the track, and that the car went about forty-five feet after the accident, sufficiently established the gripman's negligence.<sup>57</sup> So, where it appeared that a car was running faster than usual, no gong being sounded or warning given, and struck a person who had alighted from another car at a frequented crossing, went behind it, and attempted to cross the track;<sup>58</sup> and where a car, which was two blocks away when a pedestrian attempted to cross a double-track road, running fast and without sounding a gong, came past, and caught and injured her between that car and another which was only one block away when she attempted to cross;<sup>59</sup> and where the danger could have been avoided by not permitting the cars to pass each other upon the crossing.<sup>60</sup> And where a boy's foot was caught in a safety device on the track, and the gripman could have seen him a block away, and was also, while at such a distance, called to by companions of the boy who, seeing the car approaching, ran to meet it, and then ran along by its side calling to the gripman that there was a boy

(N. Y.) 30, 36 N. Y. Supp. 439, 71 St. Rep. (N. Y.) 489. And see *West Chicago St. R. Co. v. Stottenburg*, 62 Ill. App. 420; *McKeown v. Cincinnati St. R. Co.*, 2 Ohio Leg. N. 388.

**55.** *Houston City St. R. Co. v. Woodlock*, (Tex. Civ. App.) 29 S. W. 817.

**56.** *Houston City St. R. Co. v. Farrell*, (Tex. Civ. App.) 27 S. W. 942; *Sonnenfeld Millinery Co. v. People's R. Co.*, 59 Mo. App. 668; *San Antonio St. R. Co. v. Mechler*, 87 Tex. 628, 30 S. W. 899; affg. 29 S. W. 202.

**57.** *Cosgrove v. Met. St. Ry. Co.*, 173 N. Y. 628, 66 N. E. 1106.

**58.** *Pelletreau v. Met. St. Ry. Co.*, 174 N. Y. 503, 66 N. E. 1113; affg. 74 App. Div. (N. Y.) 192, 77 N. Y. Supp. 386; *Stevens v. Union Ry. Co.*, 75 App. Div. (N. Y.) 602, 78 N. Y. Supp. 624.

**59.** *O'Callaghan v. Met. St. Ry. Co.*, 174 N. Y. 521, 66 N. E. 1112; affg. 69 App. Div. (N. Y.) 574, 75 N. Y. Supp. 171.

**60.** *Schwartz v. New Orleans & C. R. Co.*, 110 La. 534, 34 So. 667.

on the track, a judgment for plaintiff was affirmed.<sup>61</sup> Again, where the deceased was killed while lying across the track in the night-time, and it was shown that pedestrians walked upon such track, it was declared that it was the duty of the motorman to exercise ordinary care and prudence in keeping a lookout for persons that might be upon the track, and that if the motorman saw, or, in the exercise of ordinary care in the circumstances, would have seen the deceased lying on the track in time to have stopped his car without injuring him, but negligently failed to do so, then the company was liable.<sup>62</sup> It is negligence on the part of an electric railway company to have a car in the city in charge of a man only eighteen years old, whose experience is limited to twenty days, and where a person is killed on the track, and doubt as to whether the life of the deceased might not have been spared, had the car been in the hands of a more competent motorman, will be construed against the car company.<sup>63</sup> If an injury to a trespasser was caused by the negligence of the motorman in failing to exercise ordinary care to know of his presence on the track and of his danger, the company was liable, unless the motorman did not discover his presence in time to have avoided injuring him, and he, by his own negligence, so contributed to cause his injury that, but for such negligence, it would not have happened.<sup>64</sup> Where a street was covered with melting snow and ice to a depth of from six to fourteen inches, and a pedestrian, to avoid the snow and ice on the sidewalk, passed along defendant's tracks, which were practically clear, it was decided that he had a right to assume that defendant's cars would not be run at an excessive rate of speed, nor was she required to anticipate that a car upon a straight track in broad daylight would run her down from the rear without warning.<sup>65</sup> Where it is evident that the attention of a pedestrian is not aroused by the ringing of the bell, and if it

**61.** *Williams v. Metropolitan St. Ry. Co.*, 114 Mo. App. 1, 5 St. Ry. Rep. 658, 89 S. W. 59.

**62.** *Goff v. St. Louis Transit Co.*, 199 Mo. 694, 5 St. Ry. Rep. 660, 98 S. W. 49.

**63.** *Crisman v. Shreveport Belt Ry. Co.*, 110 La. 640, 34 So. 718.

**64.** *Floyd v. Paducah Ry. & L. Co.*, 24 Ky. L. Rep. 2364, 73 S. W. 1122.

**65.** *Indianapolis Traction & Term.*

appears from his behavior that he will approach the car track unconscious of impending danger, it becomes the duty of the motorman, if possible, to obtain control of his car before it is too late to avoid the accident.<sup>66</sup> If the motorman could, after discovering the danger to a person upon the track, have prevented a collision by the exercise of due care, while the person could not have escaped injury, after the discovery of the approaching car, the motorman's want of care, which, if exercised, would have prevented the injury, was its legal cause, while the negligence of the person injured was the cause of the danger.<sup>67</sup> But a court cannot say that it was not negligence for a motorman to disregard the probability that pedestrians delayed by wagons might come close after them on the track, and to move his car at such speed that it could not be stopped in six feet.<sup>68</sup> Where defendant street railway company had built platforms on either side of a double-track electric street railway, connected by a crosswalk, which platforms were frequently used by the public, and the usual speed of the cars at this point was twenty miles per hour, defendant was guilty of negligence in running a car at a speed of forty-five miles per hour past such platforms in the night-time and which struck plaintiff while she was crossing to take the car after signaling it to stop.<sup>69</sup> The conduct of the driver of a street car in driving rapidly along a city thoroughfare, without looking ahead, is grossly negligent;<sup>70</sup> and the gripman of a cable car is guilty of negligence toward a person who attempts to cross the streets in front of the car, in allowing his attention to be diverted to women on the sidewalk, instead of observing objects ahead of him on the

Co., 167 Ind. 402, 5 St. Ry. Rep. 204, 79 N. E. 347.

**66.** *Aldrich v. St. Louis Trans. Co.*, 1 St. Ry. Rep. 449, and notes, (Mo.) 74 S. W. 141.

**67.** *Parkinson v. Concord St. Ry. Co.*, 71 N. H. 28, 51 Atl. 268. See also *McAndrew v. St. Louis & S. Ry. Co.*, 88 Mo. App. 97; *Hutchinson v. St. Louis & M. R. Co.*, 88 Mo. App. 376; *Legare v. Union Ry. Co.*, 61

App. Div. (N. Y.) 202, 70 N. Y. Supp. 718.

**68.** *Chicago City Ry. Co. v. Loomis*, 102 Ill. App. 326; *affd.*, 66 N. E. 348.

**69.** *Walker v. St. Paul City Ry. Co.*, 81 Minn. 404, 51 L. R. A. 632, 84 N. W. 222.

**70.** *Goldstein v. Dry Dock, etc., R. Co.*, 35 Misc. Rep. (N. Y.) 200, 71 N. Y. Supp. 477.

track.<sup>71</sup> The driver of a street car is guilty of negligence in whipping up his horses just before reaching a street crossing over which a boy is passing.<sup>72</sup> The gripman of a cable car is not, as matter of law, free from negligence in increasing the speed of his car just before reaching the farther crossing at a street crossing and failing to give any signal of his approach, when a pedestrian is crossing the track in plain sight.<sup>73</sup> When a pedestrian has reached a position of peril, not in wantonness nor with intent to expose himself to injury, but through inattention and carelessness, and is unconscious of his danger until too late to extricate himself, the negligence of the defendant, who, comprehending his situation in time to avoid injury, deliberately runs him down, occupies the whole field of culpability, to the exclusion of all other acts of negligence, and presents itself as the sole producing cause.<sup>74</sup> Where the motorman knew that the plaintiff and those who had crossed ahead of his car were proceeding near to the track and between the track and an excavation, it was declared that it was his duty to wait before starting his car until they had had an opportunity of reaching a place of safety, especially when, as it appears, even the overhang of the car, as well as the projecting fender, was liable to strike a pedestrian as the car rounded the curve.<sup>75</sup>

**§ 406. Injuries to persons on or near track — When not liable.** — Where one approaching a street railway track stops near the track, the motorman in charge of an approaching car has a right to assume that he intends to wait until the car passes, and is not guilty of negligence in releasing his brakes at the time.<sup>76</sup> And

**71.** *Martin v. Third Ave. R. Co.*, 27 App. Div. (N. Y.) 52, 50 N. Y. Supp. 284.

**72.** *Ellick v. Met. St. Ry. Co.*, 15 App. Div. (N. Y.) 556, 44 N. Y. Supp. 523. See also *Wihnyk v. Second Ave. R. Co.*, 14 App. Div. (N. Y.) 515, 43 N. Y. Supp. 1023.

**73.** *Fandel v. Third Ave. R. Co.*,

15 App. Div. (N. Y.) 426, 44 N. Y. Supp. 462.

**74.** *Bennett v. Metropolitan St. Ry. Co.*, 122 Mo. App. 703, 6 St. Ry. Rep. 33, 99 S. W. 480.

**75.** *Mittleman v. New York City Ry. Co.*, 6 St. Ry. Rep. 825, 107 N. Y. Supp. 108.

**76.** *Wolf v. City & Suburban Ry.*

it is error to refuse to charge that if a motorman, while operating his car with ordinary care, stopped his car as soon as he discovered that plaintiff was about to step in front of the car, plaintiff could not recover.<sup>77</sup> It is such gross negligence as precludes a recovery for a person to step on a railway track directly in front of an approaching car, and so close to it as to render it impossible to stop the car in time to avoid injury, although at the time the car was running at a rate of speed in excess of the maximum rate permitted by law.<sup>78</sup> Where a pedestrian has started to cross a double street-car track, and having crossed one track turns back to avoid danger on the other, and is struck by a passing car on the former, the motorman of the former car was not guilty of negligence, as he was not bound to anticipate that plaintiff, after crossing the one track, would retrace his steps.<sup>79</sup> While the presence of a wagon on the street imposed on the motorman of a street car the duty to proceed with caution, the company was not liable for an injury arising from the driver of the wagon suddenly stepping backward on the track.<sup>80</sup> The mere operation of a street car at a street crossing in such manner as to render it dangerous for a person to cross in front thereof is not negligence.<sup>81</sup> And where there is nothing to charge a motorman with notice that a pedestrian who had stepped back off the track was in a dangerous position after she stepped back from the track, he was not negligent in failing to stop the car.<sup>82</sup> But where a street railway employee catches a boy stealing a ride, and after lecturing him, lets him go, and he, on being turned loose, runs blindly into an approaching car and is injured, neither the employee nor his em-

Co., 1 St. Ry. Rep. 667, and notes. (Oreg.) 72 Pac. 329.

**77.** *Kappus v. Met. St. Ry. Co.*, 82 App. Div. (N. Y.) 12, 81 N. Y. Supp. 442.

**78.** *Moore v. Lindell Ry. Co.*, 1 St. Ry. Rep. 492, 176 Mo. 528, 75 S. W. 672.

**79.** *Jackson v. Union Ry. Co. of N. Y.*, 77 App. Div. (N. Y.) 161, 78 N. Y. Supp. 1096; *Trauber v.*

*Third Ave. Ry. Co.*, 80 App. Div. (N. Y.) 37, 80 N. Y. Supp. 231.

**80.** *Gunn v. Union R. Co.*, 22 R. I. 579, 47 Atl. 888, 48 Atl. 1045.

**81.** *Stafford v. Chippewa Valley Elec. R. Co.*, 110 Wis. 331, 85 N. W. 1036.

**82.** *Mulligan v. Third Ave. R. Co.*, 81 App. Div. (N. Y.) 214, 70 N. Y. Supp. 530.

ployer is liable therefor.<sup>83</sup> The failure of the driver of a horse car to observe a boy when he slipped on the track, on a dark night, four feet in front of the horses, at a part of the road not a crossing, does not justify an inference of negligence.<sup>84</sup> Where plaintiff was employed in filling a trench in a street, the side of the trench next to a street car track being about three feet from the track, and he was injured\* by being struck by the body of the conductor of a street car, the conductor being on the side footboard of a car and engaged in collecting fares, there was no negligence on the part of the street railway.<sup>85</sup> Where plaintiff, while crossing defendant street railway company's track at night, immediately behind one of its cars which had stopped at a crossing, fell into the "fender" attached to the rear of the car, and was dragged some distance; the conductor was collecting fares when the accident happened, and neither saw him fall, nor knew he had fallen, when he signaled to go ahead; the fender was properly folded up when the car started on its trip, and there was evidence that it was folded up nine blocks from the scene of the accident, and it did not appear how it had fallen, or that it was defective; the facts did not show negligence on the part of the defendant.<sup>86</sup> Where the motorman discovers an object on the track, which subsequently proves to be a man, as soon as it was possible to see it from his position, and does all that lies in his power to stop the car and prevent running the man down, he is not guilty of any negligence which renders the company liable.<sup>87</sup> So, in the case of a frightened horse, if the motorman could not have stopped the car in time to avoid the collision, after discovering the fright of the horse.<sup>88</sup> Failure of a gripman of a cable car to prevent a collision with

**83.** *Palmaisano v. New Orleans City R. Co.*, 108 La. 243, 32 So. 364

**84.** *De Ioia v. Met. St. Ry. Co.*, 165 N. Y. 664, 59 N. E. 1121; affg. 37 App. Div. (N. Y.) 455, 56 N. Y. Supp. 22.

**85.** *United Railways & Electric Co. v. Fletcher*, 95 Md. 533, 52 Atl. 608.

**86.** *Levison v. Met. St. Ry. Co.*, 36 Misc. Rep. (N. Y.) 827, 74 N. Y. Supp. 882.

**87.** *Stelk v. McNulta*, (U. S. C. C. A., Ill.) 99 Fed. 138, 40 C. C. A. 357.

**88.** *Molyneaux v. So. Mo. Elec. R. Co.*, 2 Mo. App. Rep. 687.

one who has been guilty of contributory negligence, after discovering the latter's danger, will not render the company liable unless the collision could have been avoided by ordinary care after making the discovery.<sup>89</sup> Where a person was injured by a bundle of papers thrown from a street car, it was said that if the conductor did this, the defendant is liable, but if a passenger on the car, acting on his own volition and without authority, did so, the defendant is not liable for his negligence in not looking; for it had not authorized him to act for it. He is liable for his own negligence in so throwing off the papers, but he could not by volunteering to throw them off impose a liability on the defendant for his negligence in throwing them off without looking.<sup>90</sup>

§ 407. **Collisions with workmen on the street.** — A street railroad company is required to use such reasonable precautions to prevent accidents or injuries to municipal or other employees engaged in work on the public streets on or near their tracks as would ordinarily be adopted by careful and prudent persons under like circumstances.<sup>91</sup> Although the care and prudence employed should be reasonably commensurate with the danger to be encountered, the servants of the company have the right to assume that a workman upon the street will exercise ordinary care to note the coming of the car and get out of the way in time to avoid danger.<sup>92</sup> But, while they have the right to assume this, the servants of the company are not free from negligence in running their cars without having them under their control so that they

89. Schoenholtz v. Third Ave. R. Co., 16 Misc. Rep. (N. Y.) 7, 37 N. Y. Supp. 682, 73 St. Rep. (N. Y.) 263; revg. 14 Misc. Rep. (N. Y.) 461, 70 St. Rep. (N. Y.) 773, 36 N. Y. Supp. 15.

90. Louisville Ry. Co. v. Holmes, (Ky.) 6 St. Ry. Rep. 847, 117 S. W. 953.

91. Schmidt v. Steinway H. P. Ry. Co., 132 N. Y. 566, 30 N. E. 389, 43 St. Rep. (N. Y.) 683; revg. 10

N. Y. Supp. 672, where plaintiff was injured while working in a trench along a street railroad by the falling of a sewer pipe which was struck by a passing car, the holding of the General Term that the railroad company owed extreme vigilance in the management of its cars and that the duty was increased by the excavation, was held to be too broad.

92. McKeown v. Cincinnati St. R. Co., 2 Ohio Leg. N. 388.

can be readily stopped, or without giving ample warning of their approach when such notice is reasonable and prudent under the circumstances.<sup>93</sup> The conditions surrounding workmen may be such as to require the person operating the car to exercise extreme care for the protection of the workmen, and to give abundant warning of its approach, and to have it under such control that it could be stopped practically upon the instant, as, for instance, where an employee is engaged in carrying hot asphalt on a shovel and placing it between the rails in the street in the laying or repair of the pavement, which is being done while the tracks are in use for running cars;<sup>94</sup> or where one is employed to pour tar into the cracks between the stones with which a portion of the street on each side of the rails of the track is paved, and the tar has to be poured into the cracks while very hot, and the employee has to get his head down to within two feet of the track in order to see that the tar enters the cracks and does not overflow them; and the company is liable where it fails to exercise such care.<sup>95</sup> So, where the deceased was engaged in spreading gravel upon the street, it was declared that the defendant could not complain that deceased was on the tracks as he had a right to be there and his duty called him there, and that though the deceased may have been guilty of negligence, yet defendant for that reason could not excuse itself if by the exercise of due care its agent could have avoided the accident after discovering the negligent party in his perilous position.<sup>96</sup> But the company is not liable where one, knowing and appreciating the danger, voluntarily assumes the risk of it, where,

**93.** *Pittsburg Elec. R. Co. v. Kelly*, 57 Kan. 514, 46 Pac. 945, where a motorman ran his car toward a gang of men employed in paving the street between the rails, although they were accustomed to step out of the way; *Owens v. People's Pass. R. Co.*, 155 Pa. St. 334, 26 Atl. 748, 32 W. N. C. 313, where a car was moved across a ditch where laborers were engaged in laying city water pipes under the tracks, without notice to the men

at work in it, although on previous occasions notice had been given.

**94.** *Bengivenga v. Brooklyn H. R. Co.*, 48 App. Div. (N. Y.) 515, 62 N. Y. Supp. 912.

**95.** *Lewis v. Binghamton R. Co.*, 35 App. Div. (N. Y.) 12, 54 N. Y. Supp. 452.

**96.** *Kramm v. Stockton Elec. R. Co.*, 3 Cal. App. 606, 5 St. Ry. Rep. 47, 86 Pac. 738.

for example, one is injured while at work on or alongside a track at a point where a car could not pass him without collision, and, although lawfully upon the tracks, voluntarily places himself in a position where an accident is inevitable if a car approaches him, and a means of escape is not at hand, and upon discovering an approaching car does nothing to provide for his safety, except to throw up his hands in warning, relying upon the watchfulness of the person operating the car;<sup>97</sup> or where an employee of the company, or an employee of a contractor doing work for the company, under the tracks of a cable road, while at work under the track as a car is passing, placed his hand on one of the rails of the track, even though he does so involuntarily or instinctively, the danger being an obvious one, with which he is chargeable with knowledge; and the company not having been negligent in the movement of its car in approaching and passing the place.<sup>98</sup> And where a person who was working on the pavement between the curbstone and car tracks was struck by a car and his work did not bring him between the tracks nor near enough to be struck by a passing car, it was declared that there was nothing to prevent the plaintiff, while doing his work, either from standing where a car could not have hit him or from taking such a position as to see readily when a car was approaching. Due care required that he should not leave all concern for his safety to the defendant. He was not at work on the defendant's premises under an implied assurance of safety.<sup>99</sup> The motorman of an electric car is not chargeable with negligence in failing to give any signal of its approach to a laborer on the street who was not so near to the track as to be in danger of being struck by the car.<sup>1</sup> The motorman of an electric car was held not guilty of negligence, as a matter of law, in moving his car forward after stopping twenty-five feet from a place where a gang

**97.** *Ferguson v. Phila. Tract. Co.*, 368; *Miller v. Grieme*, 53 App. Div. 47 Phila. Leg. Int. 494, 9 Pa. Co. (N. Y.) 276, 65 N. Y. Supp. 813. Ct. 147.

**98.** *Nolan v. Met. St. Ry. Co.*, 65 App. Div. (N. Y.) 184, 72 N. Y. Supp. 501; *Knisley v. Pratt*, 148 N. Y. 372, 42 N. E. 986, 32 L. R. A. 368; *Kelly v. Boston Elevated Ry. Co.*, 197 Mass. 420, 6 St. Ry. Rep. 768, 83 N. E. 865.

**1.** *Eddy v. Cedar Rapids & M. C. Ry. Co.*, 98 Iowa 626, 67 N. W. 676.

of men were opening a drain, although one of them raised his hand as a signal to stop while the motorman was apparently looking at him, and, after crossing the track, stooped down with his back to the car to pick up a plank, one end of which was on the track and the plank was struck by the car and thrown against him.<sup>2</sup> A motorman on a street car must use reasonable care to avoid injuring a street sweeper; the latter having not only the right, but being required, to be in the street.<sup>3</sup> A street railroad company is not liable for the death of a workman upon a street who, in a condition of fright, steps to the wrong side of the track and into danger, unless some negligence or wrongful act on its part occasioned such fright.<sup>4</sup> But the driver of a street car who passes a trench close to the track into which pipes have been in the process of lowering for several days, and which is so dangerous that a watch has been placed on guard by the street car company to see that there are no obstructions, at the rate of six miles an hour while the watchman is temporarily absent, without looking for obstructions, is guilty of negligence which will render the company liable to a workman struck by a pipe whirled about by the step of the car coming into collision with its end.<sup>5</sup> Where plaintiff, engaged in work on the public street which necessitated his kneeling on defendant's track to hand boards down into a trench, was injured by defendant's car, which came upon him, without warning, contrary to the usual custom, which was for those in charge of the car to ring a gong, when approaching the point where plaintiff was at work; plaintiff looked before kneeling and there was no car in sight; he did not look again, and the car came around the curve, 250 feet distant, about a minute later, and struck him — it was held that, assuming that the company was under no duty to give warning of the approach of the car, whether it was negligent

2. *Morrissey v. Westchester Elec. R. Co.*, 18 App. Div. (N. Y.) 67, 45 N. Y. Supp. 444.

3. *O'Connor v. Union Ry. Co.*, 67 App. Div. (N. Y.) 99, 73 N. Y. Supp. 606.

4. *McKeown v. Cincinnati St. R. Co.*, 2 Ohio Leg. N. 388.

5. *Lahey v. Central Park, etc., R. Co.*, 22 N. Y. Supp. 380, 51 St. Rep. (N. Y.) 589.

in failing to do so, having once assumed such duty, was a question for the jury.<sup>6</sup>

§ 408. **Injuries to children — Generally.** — The degree of care which is to be exercised by a street railway company is such watchfulness and precaution as are fairly proportioned to the dangers to be avoided, and greater vigilance and caution are to be exercised to prevent injuries to children than the law demands for the protection of adults.<sup>7</sup> A street railway company must exercise

6. *Daum v. North Jersey St. Ry. Co.*, 69 N. J. Sup. 1, 54 Atl. 221.

7. *Chicago St. R. Co. v. Schwartz*, 93 Ill. App. 387; *Gorman's Admr. v. Louisville Ry. Co.*, 24 Ky. L. Rep. 2364, 72 S. W. 760, holding that an instruction that it is the duty of a motorman to use ordinary care to discover and prevent injury to persons using the street, and defining ordinary care as that degree of care usually exercised by ordinarily careful persons "under the same or similar circumstances," sufficiently states the degree of care required toward a young child; *Strutzel v. St. Paul City R. Co.*, 47 Minn. 543, 50 N. W. 690; *Koersen v. Newcastle Elec. St. Ry. Co.*, 198 Pa. St. 30, 47 Atl. 851, where the question of negligence was held properly submitted to the jury, because of the failure of the motorman to observe a child about four years old crossing and recrossing the track some distance ahead of the car; *Passamaneck v. Louisville R. Co.*, 98 Ky. 195, 17 Ky. L. Rep. 763, 30 S. W. 620, the employees on a street car are required to observe greater diligence and caution in controlling its movements to prevent injuries to small children on the track than are required in the case of adults; *Woekner v. Erie Elec. Motor Co.*, 176 Pa.

St. 451, 38 W. N. C. 549, 35 Atl. 182, where a motorman was held negligent in entirely releasing the brake on his car on a down grade after bringing it almost to a stop, while a child under four years of age is within ten feet of the car and five feet of the track, although the child had turned away from the track; *Wallace v. City & Suburban Ry. Co.*, 26 Oreg. 174, 5 Am. Electl. Cas. 554; *San Antonio St. Ry. Co. v. Meehler*, 87 Tex. 628, 5 Am. Electl. Cas. 585; *Reiley v. Salt Lake R. T. Co.*, 10 Utah 428, 5 Am. Electl. Cas. 594; *Smith v. Kansas City Elec. Ry. Co.*, 61 Kan. 862, 60 Pac. 1059, a charge of negligence against a street railroad company cannot be predicated on an unexplained accident to a child; *Baltimore Tract. Co. v. Wallace*, 77 Md. 435, 21 Wash. L. Rep. 313, 26 Atl. 518, the gripman on an electric car in a large and populous city where vehicles and persons on foot, including the aged, infirm, and young children, are constantly passing and repassing, is bound not only to see that the track is clear, but to exercise constant watchfulness for persons who may approach the track; *Budd v. Meriden Elec. R. Co.*, 69 Conn. 272, 37 Atl. 683, a municipal ordinance forbidding all persons from

a much higher degree of care to a child, who, owing to his immature years, is incapable of realizing and appreciating the proximity of danger and the necessity of care and caution to avoid injury, than towards grown men and women whose knowledge, experience and mature years better enable them to look out for themselves.<sup>8</sup> It is the duty of conductors and motormen to be on the alert to see that children are not injured.<sup>9</sup> Those in charge of an electric car must calculate upon the fact that children will act with childish impulses, and where they are near the track must act accordingly with proper care and caution.<sup>10</sup> Where a motorman in charge of an electric car comes where he has reason to expect children at play, he must exercise a high degree of watchfulness in the operation of the car.<sup>11</sup> Where a person is seen on the track, or near to it, and is apparently capable of taking care of himself, the motorman should give warning by sounding his gong, and, having done so, he may assume, so long as the danger does not become imminent, that such person will leave the track before the car reaches him; but this presumption is not to be indulged in with reference to children who are too young to appreciate the danger, nor with regard to those who appear to be in peril from which they are unable to extricate themselves.<sup>12</sup> In

engaging in any game or exercise within limits of highway which shall interfere with the convenient use of the highway, does not lessen the care which a motorman of an electric car is bound to use toward a child *non sui juris*, who is playing in the street.

**8.** *Bonstow v. Capital Traction Co.*, 35 Wash. L. Rep. 238, 5 St. Ry. Rep. 83.

The motorman is said to be held to higher degree of care where he sees a child on or near the tracks than he is in the case of an adult in the same position. *South Covington & C. St. Ry. Co. v. Cleveland*, 30 Ky. L. Rep. 1072, 5 St. Ry. Rep. 338, 100 S. W. 283; *Thiel v. South Cov-*

*ington & C. St. Ry. Co.*, 25 Ky. L. Rep. 1090, 2 St. Ry. Rep. 308, 78 S. W. 206; *South Covington & C. St. Ry. Co. v. McHugh*, 25 Ky. L. Rep. 1112, 77 S. W. 1102.

**9.** *Swanson v. Chicago City Ry. Co.*, 242 Ill. 388, 6 St. Ry. Rep. 451, 90 N. E. 210.

**10.** *McDermott v. Severe*, 202 U. S. 599, 5 St. Ry. Rep. 116, 26 S. Ct. 709.

**11.** *Sample v. Consol. Light & Ry. Co.*, 50 W. Va. 472, 40 S. E. 597; *Bergen County Tract. Co. v. Heitman*, 61 N. J. L. 682, 40 Atl. 651, 11 Am. & Eng. R. Cas. N. S. 286, 4 Am. Neg. Rep. 511.

**12.** *South Chicago City Ry. Co. v. Kinnare*, 96 Ill. App. 210.

no case has it ever been held that if the motorman saw the child in a place of danger, or had reason to apprehend that it might run into a place of danger, and there was sufficient time to stop the car if under proper control, a duty resting on him at all times, it was not his duty to do so, or that the company was relieved from liability in such a case.<sup>13</sup> In an action against a street railway company to recover for injuries to a child while trespassing on the track, if the motorman discovered the child's danger in time to prevent injuring her and he negligently failed to use the means at his command, the defendant is liable.<sup>14</sup> And a street railroad company, whose motorman could and should have perceived a child of tender age on or near its tracks under circumstances indicating great danger to the child, but who, by the failure to reasonably use means to prevent injury to the child, does injure it, is liable for such injury.<sup>15</sup> Notwithstanding the

**13.** *Tatarewicz v. United Traction Co.*, 220 Pa. St. 560, 6 St. Ry. Rep. 770, 69 Atl. 995.

See *Madigan v. Berlin St. Ry. Co.*, 74 N. H. 303, 6 St. Ry. Rep. 731, 67 Atl. 404.

**14.** *Birmingham Ry., L. & P. Co. v. Jones*, 153 Ala. 157, 6 St. Ry. Rep. 235, 45 So. 177.

**15.** *Nelson v. Crescent City R. Co.*, 49 La. Ann. 491, 21 So. 635; *Shenners v. West Side St. Ry. Co.*, 78 Wis. 382, 47 N. W. 622, where a child three years of age suddenly ran toward the track when the car was ninety feet distant; *Rosenkranz v. Lindell St. Ry. Co.*, 108 Mo. 9, 18 S. W. 890, where a child ran and fell four feet in front of the horse, the evidence tending to show that the car, although the horse was going at a slow trot, could have been stopped in two feet; *Strutzel v. St. Paul City Ry. Co.*, 47 Minn. 543, 50 N. W. 690, where a boy was run down while coasting in plain view of the driver and where he knew children were ac-

customed to engage in that pastime; *Levy v. Dry Dock, etc., R. Co.*, 12 N. Y. Supp. 485, where a child attempted to cross twenty or thirty feet in front of the horses, the driver being inside the car; *San Antonio St. Ry. Co. v. Caillouette*, 79 Tex. 341, 15 S. W. 390, where a child fourteen months old crawled upon the track some distance ahead of the mule which the driver was urging forward into a more rapid trot by slapping it with the lines; *Mangam v. Brooklyn R. Co.*, 38 N. Y. 455, where a child aged three years and seven months was run over while the driver was giving his exclusive attention to a pigeon he had caught; *Anderson v. Minneapolis St. Ry. Co.*, 42 Minn. 490, 44 N. W. 518, where a child three years of age came upon the track about thirty feet ahead of the mules while the driver was inside collecting fares.

A motorman of an electric car is guilty of negligence in failing to slacken the speed of the car on ob-

negligence of a child, if the driver of a car could have prevented the accident by the exercise of ordinary care, his act was the sole cause of the injury, and the negligence of the child would not prevent recovery.<sup>16</sup> Although young children are not held to any greater degree of care than they are capable of exercising, and where the child is too young to be capable of any care the doctrine of contributory negligence is not applicable.<sup>17</sup> The fact that a

serving at a short distance a child six years old approaching the track, *Tholen v. Brooklyn City R. Co.*, 30 N. Y. Supp. 1081, 10 Misc. Rep. (N. Y.) 283; a street railway company is liable for the death of a three-and-a-half-year-old child killed by an electric car, where, if the motorman saw the child, he failed to govern the car accordingly, and, if he did not see her, it was due to the fact that he was not performing his duty by keeping a sharp lookout, or to the fact of his blindness; *Rice v. Crescent City R. Co.*, 51 La. Ann. 108, 24 So. 791; a gripman who at the time of running over a child which suddenly runs upon the track, is standing upon one side of the cab looking toward the houses, and not having his hand on his grip or brake, is guilty of negligence. *Schmur v. Citizens' Tract. Co.*, 153 Pa. St. 29, 25 Atl. 650.

16. *Mallard v. Ninth Ave. R. Co.*, 7 N. Y. Supp. 666, 27 St. Rep. (N. Y.) 801, citing *Thomas v. Kenyon*, 1 Daly (N. Y.) 142; *Sheridan v. Brooklyn, etc., R. Co.*, 36 N. Y. 39; *O'Mara v. Hudson R. Co.*, 38 N. Y. 445; *Thurber v. Harlem, etc., R. Co.*, 60 N. Y. 326; *Murphy v. Orr*, 96 N. Y. 14; *Moebus v. Herrman*, 108 N. Y. 349, 15 N. E. 415; *Colter v. Cincinnati St. Ry. Co.*, 18 Ohio C. C. 382, where the evidence tends to show that the motorman of a car running four miles an hour, that could be stopped

within twelve or fifteen feet, sees a child three and a half years of age at a point of danger fifty feet in front of him, and permits the car to run over and kill the child, it is error to direct a verdict for the railway company; *Liddy v. St. Louis R. Co.*, 40 Mo. 506; *Ramsey v. Montreal St. Ry. Co.*, 32 C. L. J. 52; *Nugent v. Metropolitan St. R. Co.*, 17 App. Div. (N. Y.) 582, 45 N. Y. Supp. 596, where the driver of the car was at the time looking on the side of the street, instead of where he was driving, and the car might have stopped in time to prevent the injury after it became apparent that a three-year-old child was coming upon the track, if the driver had been looking; *Huerzeler v. Central Crosstown R. Co.*, 20 N. Y. Supp. 676, 1 Misc. Rep. (N. Y.) 136, where a street car driver while running at a speed twice that allowed by law, failed to apply the brake on seeing a child crossing the street, when if he had done so he could have stopped the car in season to avoid injury.

17. *Galveston City R. Co. v. Hewitt*, 67 Tex. 473, 60 Am. Rep. 32; *Etherington v. Prospect Park, etc., R. Co.*, 88 N. Y. 641, 4 Am. & Eng. R. Cas. 617; *Collins v. South Boston R. Co.*, 142 Mass. 301, 26 Am. & Eng. R. Cas. 371, 36 Am. Rep. 675, 7 N. E. 856; *Philadelphia B. & W. R. Co. v. Layer*, 112 Pa. St. 414, 26 Am. &

child may not be capable of contributory negligence, or that the negligence of his parents cannot be imputed to him, does not always render the company liable upon mere proof of the fact of injury. The negligence of the company must be proven.<sup>18</sup> Thus, injuries to a child which gets under the hind wheels of a street car, after the fore wheels have passed safely, are not attributable to the negligence of the driver or of the conductor.<sup>19</sup> An error in the exercise of judgment by the motorman of an electric car in backing the car over a boy who has been run over in his attempts to save the boy from injury, does not render the company liable for the injury resulting from backing the car.<sup>20</sup> The liability of a street car company for the death of a boy through a collision between its cars and a dray upon which he was riding is not affected by the fact that he was stealing a ride upon the wagon.<sup>21</sup> In the case of a child the company would not be liable where there is no evidence tending to show any negligence of the defendant, and where, without such negligence, the child appeared so suddenly and immediately in front of the car that it could not have been either stopped or slackened, so as to avert the collision.<sup>22</sup> So, where a child was struck by a car, it was held proper to instruct the jury as follows: "If the jury believe from the evidence that the child ran out in the street so close to the car that, if the car was running at a reasonable rate of speed, the motorman could not, by the exercise of ordinary care, have perceived its danger and stopped the car so as to avoid injury to it, the jury should find for the defendant." <sup>23</sup>

Eng. R. Cas. 376, 3 Atl. 874; Chicago W. D. Ry. Co. v. Ryan, 131 Ill. 474, 43 Am. & Eng. R. Cas. 396, 23 N. E. 385; Phila. City Pass. R. Co. v. Hassard, 75 Pa. St. 367.

**18.** Roller v. Sutter St. R. Co., 66 Cal. 230, 19 Am. & Eng. R. Cas. 333.

**19.** Bulger v. Albany R. Co., 42 N. Y. 459.

**20.** Bittner v. Crosstown St. R. Co., 153 N. Y. 76, 46 N. E. 1044;

revg. 33 N. Y. Supp. 672, 12 Misc. Rep. (N. Y.) 514.

**21.** Wright v. Cincinnati St. R. Co., 9 Ohio C. C. 503, 2 Ohio Dec. 308.

**22.** Cytron v. St. Louis Transit Co., 205 Mo. 692, 5 St. Ry. Rep. 609, 104 S. W. 109.

**23.** Lexington Ry. Co. v. Laden's Admr., 32 Ky. L. Rep. 1047, 6 St. Ry. Rep. 730, 107 S. W. 740.

§ 409. **Injuries to children — Negligence of company — When liable.** — Where a motorman sees, or ought to have seen, that a child less than six years of age is in such a situation or so acting as to expose him to danger from an advancing car, of which he is unaware, such motorman should get the car so fully under control as to avoid injury, and give warning and take such other measures as would prevent injury.<sup>24</sup> A motorman cannot assume that a child seven years old, hurrying toward the track, and looking in the opposite direction, will not go on the track in front of the car.<sup>25</sup> The courts have held that where defendant's car was running fast, and the motorman, when he was within 125 feet of a child which was approaching the track, heard a woman scream in the second story of a house near by, and looked in that direction, and then looked back into the car, and did not discover the child until close upon it, the evidence was sufficient to support a finding that the motorman was negligent;<sup>26</sup> that where a child four years old, with his sister nine years old, attempted to cross a street car track, when the car was distant from fifty to one hundred feet, the horses going fast down an incline, and the driver looking into the car, and without his hand on the brake, and the child broke away from his sister and was run over by the car, that it was error to dismiss the complaint;<sup>27</sup> that where a child two years old was walking on a street car track toward a car approaching on an adjoining track, and crossed over onto such track about two lengths in front of the car, and was run down, there being nothing to obstruct the view of the motorman, a finding that he was negligent was justified;<sup>28</sup> that where an electric car, which run over and killed a boy six years old, was running near a schoolhouse, where children were on the street, at a rate of twenty-five miles an hour,

**24.** *Chicago City Ry. Co. v. Tuohy*, 95 Ill. App. 314; *affd.*, 196 Ill. 410, 63 N. E. 997.

**25.** *Citizens' St. R. Co. v. Hamer*, 29 Ind. App. 426, 62 N. E. 658, 63 N. E. 778.

**26.** *Fullerton v. Metropolitan St. Ry. Co.*, 170 N. Y. 592, 63 N. E.

1116; *affg.* 63 App. Div. (N. Y.) 1, 71 N. Y. Supp. 326.

**27.** *Goldstein v. Dry Dock, etc., R. Co.*, 71 N. Y. Supp. 477, 35 Misc. Rep. (N. Y.) 200.

**28.** *Jones v. United Tract. Co.*, 201 Pa. St. 344, 50 Atl. 826.

without notice, by gong or otherwise, a verdict for the plaintiff was sustained by the evidence;<sup>29</sup> that where defendant's street car was running slowly, and plaintiff, a child four years of age, walking from the direction the car was coming, went obliquely on the track about twelve feet ahead of the car, and, although persons shouted to the motorman, he either looked toward them or was talking to another employee, and the child was struck and injured, the motorman was guilty of negligence.<sup>30</sup> And the motorman of an electric car is not, as matter of law, free from negligence in running over a child two and a half years old who, after crossing the track a few feet in front of the car, suddenly turned back on the track, where the car was going slowly and was distant fifty or one hundred feet when the child left the sidewalk, nor in running over and killing such a child, who is on the track in the middle of a block, where just before the accident his face had been turned away from the track while talking to a passenger, and no signal of the approach of the car was given.<sup>31</sup> Nor is the motorman of an electric car free from negligence, as a matter of law, in running a car at the rate of ten miles an hour through a street crowded with children on which his view in front was unobstructed, with his eyes fixed on one child only;<sup>32</sup> nor in failing to see a child less than two and a half years old until she was in front of and almost under the car, where a passenger saw her start across the street before the car started;<sup>33</sup> nor in attempting to run the car past a girl nine years old, who is running away from it toward a part of the street where it is obstructed to within three feet of the track.<sup>34</sup> A motorman of an electric street car who sees a child playing upon one of the sidewalks, and in the discharge of his

**29.** *Hoon v. Beaver Val. Tract. Co.*, 204 Pa. St. 369, 54 Atl. 270.

**30.** *San Antonio Tract. Co. v. Court*, (Tex. Civ. App.) 71 S. W. 777.

**31.** *North Chicago St. R. Co. v. Hoffart*, 82 Ill. App. 539; *Karahuta v. Schuykill Tract. Co.*, 6 Pa. Super. Ct. 319, 42 W. N. C. 47.

**32.** *Buente v. Pittsburg, etc., Tr. Co.*, 2 Pa. Super. Ct. 185.

**33.** *Calumet Elec. St. R. Co. v. Lewis*, 68 Ill. App. 598; *affd.*, 168 Ill. 249, 48 N. E. 153.

**34.** *Calumet Elec. St. R. Co. v. Lewis*, 68 Ill. App. 598; *affg.* 168 Ill. 249, 48 N. E. 153.

duty to others, who, for aught he knows, may be in danger, turns his eyes in another direction, is guilty of no negligence in failing to see the child leave the sidewalk and run in the direction of the approaching car, and where it appears that he saw the child a moment afterwards running towards the track, but too late to enable him to stop the car, though he did all that could then be done to stop it, the blame for the resulting tragedy cannot be laid at his door.<sup>35</sup>

**§ 410. Injuries to children — When company not chargeable with negligence.** — Where a child two years old ran across the track of a horse railroad company and was run over and killed by one of their cars, bystanders shouted to the driver to stop, but his attention was turned in another direction, but he was driving slowly and cautiously, it was held that no negligence was shown on the part of the driver.<sup>36</sup> An electric railway company is not liable for the death of a child, *non sui juris*, resulting from his suddenly coming in front of the car when it is too near him to stop it before inflicting the injury.<sup>37</sup> A street railroad company is not liable for an injury to such a child on its track, where its employees were entirely free from negligence, nor for injury to a small boy run over by its car, where, when he started to run in front of it, there was not time enough for the motorman to stop the car to prevent the accident.<sup>38</sup> It has been held that a street railway company is not liable for the death of a boy who ran in

**35.** *Cloud v. Alexandria Electric Rys. Co.*, 121 La. 1061, 6 St. Ry. Rep. 303, 46 So. 1017.

**36.** *Boland v. Missouri R. Co.*, 36 Mo. 484. See also *Maschek v. St. Louis R. Co.*, 71 Mo. 276; *O'Connor v. Boston, etc., R. Co.*, 135 Mass. 352, 15 Am. & Eng. R. Cas. 362.

**37.** *Culbertson v. Crescent City R. Co.*, 48 La. Ann. 1376, 20 So. 902; *Adams v. Nassau Elec. R. Co.*, 41 App. Div. (N. Y.) 334, 58 N. Y. Supp. 543, where the rule that a child

*non sui juris*, who is the heedless instrument of his own injury, cannot recover damages, was applied in the case of a child five years old who suddenly left the curb and rushed headlong against a street motor; *Hirschman v. Dry Dock, etc., R. Co.*, 46 App. Div. (N. Y.) 621, 61 N. Y. Supp. 304; *Callary v. Easton Trans. Co.*, 185 Pa. St. 176, 39 Atl. 813; *McLaughlin v. New Orleans & C. R. Co.*, 48 La. Ann. 23, 18 So. 703.

**38.** *Sciortino v. Crescent City R.*

front of a car when he was so close upon him that a collision could not have been prevented, even though the car was running at a negligent rate of speed.<sup>39</sup> In other cases, it has been held that a street railway company is not liable for negligence where a boy seven and a half years of age came from a store, walked over to the track, and jumped in front of the car when it was almost abreast of him;<sup>40</sup> that the motorman is not chargeable with negligence in failing to keep a proper lookout, nor because of his failure to give signals, by the fact that a four-year-old boy, playing with other boys on the sidewalk in the middle of a block, suddenly runs into the street, and across the railroad track, directly in front of an approaching car, when the motorman did everything in his power to stop the car, when the boys started to run across the street;<sup>41</sup> that the company is not liable for negligence where a boy six years old running across a street car track could have crossed in safety but for his stopping to pick up a penny he had dropped, where it was not shown that the gripman did not apply the brakes as soon as he discovers the boy's danger, nor that he did not stop his car in the shortest time, although he failed to ring the gong;<sup>42</sup> that it was not liable where a boy sixteen years old ran suddenly against the car or upon the track immediately in front of the car;<sup>43</sup> nor where the child suddenly and unexpectedly appeared on the track in front of a car under such circumstances that the driver could not have discovered its presence in time to avert the accident;<sup>44</sup> nor where a child stepped from behind a wagon passing in the opposite direction before a motor car when it was only five feet away;<sup>45</sup> nor for injuries to a boy due to his suddenly and unex-

Co., 49 La. Ann. 7, 21 So. 114; Hunter v. Consol. Tract. Co., 193 Pa. St. 557, 44 Atl. 578.

**39.** Pletcher v. Scranton Tract. Co., 185 Pa. St. 147, 39 Atl. 837.

**40.** Finlay v. West Chicago St. Ry. Co., 90 Ill. App. 368.

**41.** Graham v. Consol. Tract. Co., 64 N. J. L. 10, 44 Atl. 964.

**42.** Frank v. Metropolitan St. Ry.

Co., 44 App. Div. (N. Y.) 243, 60 N. Y. Supp. 616.

**43.** Mulcahy v. Electric Tract. Co., 185 Pa. St. 427, 39 Atl. 1106.

**44.** Kierzenkowski v. Phila. Tract. Co., 184 Pa. St. 459, 39 Atl. 220, 9 Am. & Eng. R. Cas. N. S. 533.

**45.** Ogier v. Albany Ry. Co., '88 Hun (N. Y.) 486, 34 N. Y. Supp. 867, 5 Am. Electl. Cas. 545.

pectedly running against the car or so close to it that it necessarily ran against him, whether or not contributory negligence can be imputed to him; <sup>46</sup> nor where a seven-and-a-half-year-old girl ran on the track between two street crossings, where upon her starting to run across the driver called out to her and she answered that she could get across, and the driver supposed his warning would be sufficient; <sup>47</sup> nor where a child five and a half years old ran from the sidewalk against a moving car; <sup>48</sup> nor where a child ran behind a car so as to stand between the tracks as a car going in the opposite direction reached the spot, though by the efforts of the driver to swing his horses away from her she is struck by one of them and injured; <sup>49</sup> nor where a child came upon the track in front of a team from behind a wagon standing near the track, where the driver made every reasonable effort to stop the car in the shortest time practicable; <sup>50</sup> nor for injuries to an intelligent boy ten years of age, who fell in running across the track not more than twenty feet in advance of a moving car, not at a crossing, and was run over, in the absence of evidence that the driver could have avoided the injury by arresting the car after the fall.<sup>51</sup> The fact that the motorman in charge of an electric car by which a child eighteen months old was injured while on the track was inexperienced cannot be taken into consideration in determining the question of negligence in failing to stop the car so as to avoid the injury, as the company is responsible in cases where an infant gets upon its track for the want of ordinary care only in providing proper servants to manage its cars.<sup>52</sup> Where the

**46.** *Funk v. Electric Tract. Co.*, 175 Pa. St. 559, 34 Atl. 861.

**47.** *Flanagan v. People's Pass. Ry. Co.*, 163 Pa. St. 102, 29 Atl. 743.

**48.** *Chilton v. Central Tract. Co.*, 152 Pa. St. 425, 25 Atl. 606, 31 W. N. C. 409.

**49.** *Baker v. Eighth Ave. R. Co.*, 62 Hun (N. Y.) 39, 16 N. Y. Supp. 319.

**50.** *Kennedy v. St. Louis R. Co.*, 43 Mo. App. 1.

**51.** *Fenton v. Second Ave. R. Co.*, 126 N. Y. 625, 26 N. E. 967, 36 St. Rep. (N. Y.) 385; revg. 56 Hun (N. Y.) 99, 9 N. Y. Supp. 162.

**52.** *Cunningham v. Los Angeles R. Co.*, 115 Cal. 561, 47 Pac. 452; revg. 89 Hun (N. Y.) 609; *Lavin v. Second Ave. R. Co.*, 12 App. Div. (N. Y.) 381, 42 N. Y. Supp. 512, the driver of a horse car which is proceeding slowly is not guilty of negligence in failing to stop the car immediately

motorman of an electric car sees a little girl start to run across the track as he approaches, and apparently with sufficient time to do so, he has the same right as the child to believe that she will get across in time to avoid a collision, and it is only when he sees her fall that he is obliged to apply the brake and make every effort to stop the car. It is not negligence for the motorman to use the brake instead of a reversal of the motor, where the latter is not shown to be a more effectual way of stopping the car. The question is one for the exercise of his judgment, and an error in that respect is not negligence chargeable against his employer.<sup>53</sup> A motorman is justified in believing that a boy more than eleven years old will not, after warning, attempt to cross the street so nearly in front of a car that an accident cannot be prevented.<sup>54</sup> A driver of a street car who sees a child five or six years old upon the sidewalk is not bound to bring the car to a dead stop to guard against the bare possibility of the child's suddenly walking or running into danger.<sup>55</sup> A motorman on an electric railway is not chargeable with negligence in failing to slacken the speed of his car on seeing a child in the gutter of the street, when the child indicated no intention of crossing the street until the car was within about ten feet of the place where it attempted to cross in front of the car and was injured.<sup>56</sup> Where a child runs upon a track in front of an approaching electric car and is injured, no liability attaches to the motorman or his employer, if the circumstances were not such as were calculated to cause the motorman, in the exercise of proper prudence and caution, to suspect that it would do so, and he takes immediate action to save the situation the moment its intended course is shown.<sup>57</sup> Where it appeared that plaintiff, four years and three months of age, was playing on

on seeing a child at a distance of eighteen feet apparently about to cross the track.

**53.** *Stabenau v. Atlantic Ave. R. Co.*, 155 N. Y. 511, 50 N. E. 277.

**54.** *McLaughlin v. New Orleans & C. R. Co.*, 48 La. Ann. 23, 18 So. 703.

**55.** *Gannon v. New Orleans City*

& L. R. Co., 48 La. Ann. 1002, 20 S. 223.

**56.** *Fleishman v. Neversink M. R. Co.*, 174 Pa. St. 510, 34 Atl. 119.

**57.** *Campbell v. New Orleans City R. Co.*, 104 La. 183, 23 So. 985; *Holdridge v. Mendenhall*, 108 Wis. 1, 83 N. W. 1109, where a child playing in

a bar under and near the rear of a horse street car, which, with two or three other cars in front of it, had stopped in the street for about half an hour, when the car started forward, without warning, and the rear wheels passed over plaintiff's arm and leg; that none of defendant's employees were on the side of the car where plaintiff was playing, or knew or had reason to think that he was under the car, nor could they see him from their proper positions in managing the car — it was held that there was no negligence on the part of the defendant contributing to the injury, and an instruction for defendant was proper, as the defendant owed no duty to the plaintiff to signal when about to start the car, or to anticipate that he might be playing under the car.<sup>58</sup> A street railroad company is not liable for the death of a boy caused by being struck by one of its cars, where he stood between the tracks in the middle of a block in an attitude of watchfulness, apparently waiting for an approaching car to pass, and suddenly started to run across the street in front of the car and was struck.<sup>59</sup> A street railroad com-

the street suddenly and unexpectedly ran in front of a moving street car, and the motorman could not have reasonably anticipated its action, his failure to anticipate was not negligence; *Baier v. Camden & S. Ry. Co.*, 68 N. J. 42, 52 Atl. 215, a motorman is not chargeable with negligence because he failed to apprehend that a boy, who is riding on the back of a wagon, will jump from the wagon and run under his car; *Miller v. Union Tract. Co.*, 198 Pa. St. 639, 48 Atl. 864, not liable for failing to anticipate the action of a boy who ran along the sidewalk a short distance and then into the street and collided with a car.

**The gripman on a cable street car** is not bound to anticipate that a child on the sidewalk will run suddenly toward the track; nor is it absolutely his duty to stop the car at once if he sees a boy running toward

the track, but he may exercise his judgment to determine whether the boy will see the car and stop; and if he acts as a reasonably prudent gripman ought, and makes every effort he can to avoid injury, the company will not be liable for injury to such boy. *Mt. Adams, etc., R. Co. v. Cavagna*, 6 Ohio C. C. 606. A gripman of a cable car is not bound to anticipate that a small boy standing near the curb will suddenly start to run across the street immediately in front of the car, where there is nothing to indicate that he was about to do so until he starts; and the gripman is not negligent in failing to slacken the speed of the car before such time. *Rock v. Chicago City R. Co.*, 173 Ill. 289, 50 N. E. 668; affg. 69 Ill. App. 656.

**58.** *Siatick v. Northern Central Ry. Co.*, 92 Md. 213, 48 Atl. 149.

**59.** *Greenberg v. Third Ave. R. Co.*,

pany is not guilty of culpable negligence rendering it liable for the death of a child, because its car was going faster than the maximum speed allowed by city ordinance, where the mules hitched to the car became frightened at an engine and started up the street, and before they had gone more than fifty yards, the child ran in front of the car, only three or four feet in advance of the mules, and so near that the driver was unable to avoid the accident.<sup>60</sup> A street car company is not liable for injuries to a child whom its motorman sees standing five feet away from the track, and who suddenly breaks loose from its companions and runs across the track, when the motorman uses all the means at his command to stop the car.<sup>61</sup> The motoneer of an electric car was held not guilty of negligence in acting upon the supposition that a boy standing at the side of the track, twelve or fifteen feet in front of a car, was waiting for the passage of the car, although the boy was in fact waiting for the passage of a car on the farther track, and did not see the car in question, where there was nothing to indicate such fact to the motoneer.<sup>62</sup> It has been held not negligence *per se* for a street car driver to drive his horse at a trot over a street crossing, nor is the mere failure to have a fender upon the car that will prevent one from being run over by it negligence *per se*.<sup>63</sup> In a case in Kentucky it is declared that the mere proximity of a boy nine years old to the track is not sufficient notice to charge the motorman with the duty of ringing his bell and taking other precautions in anticipation that the boy may get in front of the moving car.<sup>64</sup> And since a street railway company owes no duty to keep a lookout for trespassers, injury to a

35 App. Div. (N. Y.) 619, 55 N. Y. Supp. 135.

60. *Trumbo v. City St. Car Co.*, 89 Va. 780, 17 S. E. 124, 17 Va. L. J. 207.

61. *Paducah St. R. Co. v. Adkins*, 14 Ky. L. Rep. 425.

62. *O'Rourke v. New Orleans City & L. R. Co.*, 51 La. Ann. 755, 25 So. 323.

63. *West Chicago St. Ry. Co. v. Sullivan*, 64 Ill. App. 628; *affd.*, 165 Ill. 302, 46 N. E. 234; *Hogan v. Citizens' R. Co.*, 150 Mo. 36, 51 S. W. 473.

64. *Louisville Ry. Co. v. Edelen's Admx.*, 29 Ky. L. Rep. 1125, 5 St. Ry. Rep. 334, 96 S. W. 901.

child trespassing on the track is held not to constitute actionable negligence.<sup>65</sup>

**§ 411. Obstructing street car line by moving of house.** — While all persons ordinarily have a right to use the streets to the same extent with the car company, yet they have no right to unreasonably or unduly occupy a street and in such a manner as to seriously interfere with the operation of a street car line. So a person has no right to prevent the running of cars for such a period of time as may be necessary to move a building along the street from one location to another. Such a use of the streets is an extraordinary one, and where it has such a result the party claiming the right may be restrained by injunction from so doing.<sup>66</sup>

**65.** *Birmingham Ry., L. & P. Co. v. Jones*, 153 Ala. 157, 6 St. Ry. Rep. 235, 45 So. 177.

**66.** *Millville Traction Co. v. Goodwin*, 53 N. J. Eq. 448, 5 Am. Electl. Cas. 23, 32 Atl. 263. It appeared in this case that the building was a two-story and a half frame structure, that it was necessary to carry the building one hundred and eleven feet along the track and that the work would take at least two days. The court said: "The claim of the defendants is that they have the right to occupy the streets in moving the house of Goodwin to such an extent, or for so long a period of time, as may be necessary for that purpose, irrespective of the inconvenience to the railroad company, or interference with the regular and ordinary use of its tracks in running its cars. This is manifest by the admission in the answer of the manner in which they stretched their chains and other appliances across the track of the railroad in order to move the building, thereby at once preventing the regular, continuous running of

the cars. Evidently this is an extraordinary use of the streets, and if every citizen should make similar claims, and there should be frequent demands therefor, there would be constant friction between citizens, and our streets would be constantly obstructed by the moving of ponderous bodies, unless they were widened greatly beyond their present limits. Hence I conclude, in the absence of municipal authority regulating the use of the streets in which street railways have been constructed under the law and city ordinances, and are in daily use, by persons who claim the right to use such streets in a manner which will necessarily interfere with the running of the cars on such railways, or with the appliances constructed to propel such cars, that a court of equity will, when called upon, restrain a party claiming such right from interfering with or obstructing the usual and ordinary running of the cars of such railways." *Per BIRD, V. C.*

The moving of a house along a public street of a city is an extraordinary

And in a recent case in which this question is considered it is declared that the use of a street for the purpose of moving a house along it is an unusual and extraordinary one, and that there is no tenable ground for demanding that the operation of a street railway shall cease or be unduly interfered with for such a purpose.<sup>67</sup> So in a case in Indiana it is decided that the moving of

use thereof, for an unusual purpose, and the courts have the power to restrain such a moving across a street electric railroad when it will result in the stopping of cars an unnecessary length of time and the cutting or destruction of the wires, even though the common council of the city have failed or refused to take any steps to prevent such injury or destruction. *Williams v. Citizens' Ry. Co.*, 130 Ind. 71, 29 N. E. 408, 15 L. R. A. 64, 30 Am. St. Rep. 201.

67. *Ft. Madison St. Ry. Co. v. Hughes*, 137 Iowa 122, 6 St. Ry. Rep. 253, 114 N. W. 10. The court said, *per LADD, J.*: "Having made compensation for any injury resulting to abutting property, laid its track in the street, and estimated its line in pursuance to this statute, the company had the right to operate the same, and to the full, free, and complete exercise of the franchise with which it was clothed. That a street railway interferes with ordinary travel to some extent cannot be doubted. This is necessarily taken into account in permitting its use of the street and in assessing damages resulting therefrom. And there is no doubt but that one desiring to change the location of a house or other structure may move it along a public street, providing the conditions of the street are such that this may be done without injury to others having a prior right thereto, and pro-

viding further, that this does not by interfering with travel become a nuisance. But, where the use of the street has been lawfully appropriated in so far as essential for the operation thereon of an electric street railway, one of the modern conveniences of travel and transportation, there is no tenable ground for demanding that its operation shall cease or be unduly interfered with, or that the value of its franchise shall be impaired or its property destroyed to enable another to make an unusual and extraordinary use of the street in the moving of houses or other structures over it. This would be inconsistent with the franchise granted to which the street has become subject. The rights of the defendants to the use of the street was limited by those of the company to operate its cars thereon, and they could not insist upon the elimination of its franchise rights in order to give way to them over the road in moving the house. In other words, the defendants had the right to the use of the street as it was, with the trolley line in operation, and not as it would have been had no franchise been granted by the city to Ft. Madison; and, as they could not move the house lengthwise on the street as they intended without occupying the company's track, destroying the trolley line, and interrupting for a considerable time the operation of its cars, the jury was rightly instructed

a house along a public street of a city is an unusual use of such street, and that the courts have power to restrain such a use when the moving will result in the stopping of the cars of a street railway line for an unnecessary length of time, and in the cutting or destruction of its wires, even though the common council of the city has failed or refused to take any steps to prevent such injury or destruction.<sup>68</sup> A city ordinance providing that a person desiring to move a house along street railway tracks shall apply to the city clerk for a license, and, on the granting of the same, give twenty-four hours' notice to the local agent or manager of the railway company, and that upon compliance with these requirements it shall be the duty of the company to raise or move its wires so that the house can pass, has been held to be valid exercise of the city's police power.<sup>69</sup>

that they were not entitled to take the house into that street. As directly in point, see *Millville Traction Co. v. Goodwin*, 53 N. J. Eq. 448, 32 Atl. 263; *Williams v. Citizens' Ry. Co.*, 130 Ind. 71, 29 N. E. 408, 15 L. R. A. 64, 30 Am. St. Rep. 201; *Dickinson v. Electric L. & M. Co.*, 53 Ill. App. 379; *Croswell on Electricity*, § 259; 1 *Joyce on Electric Law*, § 481; *Elliott on Roads and Streets* 578."

**68.** *Williams v. Citizens' Ry. Co.*, 130 Ind. 71, 29 N. E. 408, 15 L. R. A. 64, 30 Am. St. Rep. 201.

**69.** *Indiana Ry. Co. v. Calvert*, 168 Ind. 321, 5 St. Ry. Rep. 229, 80 N. E. 961. The court said in this case: "The ordinance in the case before us merely calls on the company temporarily to raise or remove its wires so as to allow the building to pass,

and, as a consequential effect, to submit, with the rest of the public, to the disturbance of traffic in some degree. It is clear that this does not constitute a technical taking of property as that term is used under the law of eminent domain (*Richmond, etc., R. Co. v. Richmond*, 96 U. S. 521, 24 L. ed. 734; *Mugler v. Kansas*, 123 U. S. 623, 8 S. Ct. 273, 31 L. ed. 205), and as the damage is a minor and consequential one, done under the police power, we are of opinion, so long as the interference cannot judicially be said to be unreasonable that there is no right to damages, as it is a case wherein the company is merely controlled in the use of its property by a governmental regulation." *Per GILLET, J.*

## CHAPTER XVIII.

### Persons Using Streets; Contributory Negligence.

- SECTION 412. Contributory negligence generally.  
 413. Contributory negligence generally continued.  
 414. Contributory negligence of drivers of vehicles in going on or across tracks.  
 415. Contributory negligence of drivers of vehicles in going on or across tracks — Application of rules.  
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 419. Contributory negligence of pedestrians in crossing tracks without looking or listening.  
 420. Duty of pedestrian to look and listen — Application of rules.  
 421. Contributory negligence of pedestrians in going on or across tracks.  
 422. Contributory negligence of pedestrians — Instances when none.  
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 424. Contributory negligence of pedestrians in standing on or near tracks or walking along tracks.  
 425. Contributory negligence of workmen in the public streets.  
 426. Contributory negligence of bicyclists.  
 427. Contributory negligence of drivers and occupants of horse carts, ambulances, etc.  
 428. Contributory negligence of children.  
 429. Contributory negligence of parents, guardians, or custodians.  
 430. Contributory negligence of aged and infirm persons.

§ 412. Contributory negligence generally. — Pedestrians in crossing the tracks of a street railway, knowing that the crossing is one where cars frequently pass, must use their senses to apprise them of the danger. They cannot heedlessly and carelessly cross the track, and throw the entire burden of their safety upon the motorman of any approaching car. The rights of the pedestrian and that of the street railway are equal. Their duties are recipro-

cal.<sup>1</sup> Persons using the streets of a city on which street cars are operated are required to use ordinary and reasonable care to avoid collision by stopping, and, if need be, turning out and keeping off the tracks in the presence of danger. A person attempting to cross a street railway track is bound to look and listen for approaching cars in time, if possible, to avoid collision; and if he does not look and listen and does not see or hear an approaching car until it is too late to avoid a collision, he is guilty of negligence.<sup>2</sup> A person crossing a street railway track is required to use his senses, and exercise that degree of care that men of ordinary prudence would exercise under the particular circumstances of the case.<sup>3</sup> Ordinary care in crossing street railway tracks is such care as persons of ordinary care and prudence observe in their business, or such care as the great mass of mankind, or the majority of mankind, observe in the transactions of human life.<sup>4</sup> In determining the question of contributory negligence, due care or ordinary prudence is the only known test. What would be due care under certain circumstances would not be due care under other and different circumstances; and, in determining this question, this court has refused to predicate its answer alone upon the fact that it did not appear that the person about to cross the track looked or listened, and say such failure of itself alone constitutes negligence in law. Other facts existing and present and affecting the situation must be given their due weight in determining the question of contributory negligence. In other words, it is not alone: 'Did the pedestrian look and listen? And, upon answering that question in the negative, say it is negligence *per se*, and there can be no recovery. But the test is: Did the pedestrian, under all the circumstances,

1. *Hellieson v. Seattle Electric Co.*, 56 Wash. 278, 6 St. Ry. Rep. 357, 105 Pac. 458. See *Youngquist v. Minneapolis St. Ry. Co.*, 102 Minn. 501, 6 St. Ry. Rep. 737, 114 N. W. 259.

2. *Wilman v. People's Ry. Co.*, (Del.) 55 Atl. 332; *Robards v. Indianapolis St. Ry. Co.*, 1 St. Rep. 133, 32 Ind. App. 297, 66 N. E. 66, 67

N. E. 953; *Burns v. Met. St. Ry. Co.*, 66 Kan. 188, 71 Pac. 244.

See section 416, 420, *post*, in this chapter, as to obligation to look and listen.

3. *Spiking v. Consolidated Ry. & P. Co.*, 33 Utah 313, 6 St. Ry. Rep. 320, 93 Pac. 838.

4. *Grimm v. Milwaukee Elec. Ry.*

use such a degree of care, caution, and prudence as an ordinarily prudent and careful pedestrian would use under like circumstances?<sup>5</sup> Neither haste nor mental pre-occupation on the part of a person using such a crossing will justify or excuse his failure to make a reasonable effort to ascertain whether it is reasonably safe to attempt to cross. He must have in mind the matter of effecting the crossing.<sup>6</sup> Persons traveling on the public street, along or across a street railway track, are not held to the exercise of the same degree of care and precaution as they are when traveling, or upon, or across the ordinary steam railroad.<sup>7</sup> The duties of persons with respect to steam railways and street railways are not so analogous as to be governed at all times by the same rule. The rights of persons are greater and the dangers less in connection with the latter; the rights of street cars, no matter by what

& L. Co., 138 Wis. 44, 6 St. Ry. Rep. 464, 119 N. W. 833.

5. *Hellieson v. Seattle Electric Co.*, 56 Wash. 278, 6 St. Ry. Rep. 357, 105 Pac. 458, citing in this connection *Skinner v. Tacoma Ry. & Power Co.*, 46 Wash. 122, 89 Pac. 483; *Mey v. Seattle Electric Company*, 47 Wash. 497, 92 Pac. 283; *Dimuria v. Seattle Transfer Company*, 50 Wash. 633, 97 Pac. 657.

6. *Riedel v. Wheeling Traction Co.*, 63 W. Va. 522, 6 St. Ry. Rep. 491, 61 S. E. 821.

7. *Spiking v. Consolidated Ry. & P. Co.*, 33 Utah 313, 6 St. Ry. Rep. 320, 93 Pac. 838.

The general rule is that the same care or watchfulness is not required in crossing a street car track as in crossing a railway track. *Bremer v. St. Paul City Ry. Co.*, 107 Minn. 326, 6 St. Ry. Rep. 543, 120 N. W. 382, citing *Lyman v. Railway Co.*, 114 Mass. 88; *Robbins v. Railway Co.*, 165 Mass. 30, 42 N. E. 334; *Hall v. Railway Co.*, 168 Mass. 461, 47 N. E.

124; *White v. Railway Co.*, 167 Mass. 43, 44 N. E. 1052; *Marden v. Railway Co.*, 3 St. Ry. Rep. 300, 100 Me. 41, 60 Atl. 530, 69 L. R. A. 300, 109 Am. St. Rep. 476 (a leading case); *Newark Ry. Co. v. Block*, 55 N. J. L. 614, 27 Atl. 1067, 22 L. R. A. 374; *Consol. T. Co. v. Scott*, 58 N. J. L. 682, 34 Atl. 1094, 33 L. R. A. 122, 55 Am. St. Rep. 620; *Richmond Ry. Co. v. Carthright*, 92 Va. 627, 24 S. E. 267, 32 L. R. A. 220, 53 Am. St. Rep. 839; *R. & P. Co. v. Gordon*, 2 St. Ry. Rep. 936, 102 Va. 498, 46 S. E. 772; *Chauvin v. D. R. Co.*, 2 St. Ry. Rep. 478, 135 Mich. 85, 97 N. W. 160; *Pilmer v. Railway Co.*, 14 Idaho 327, 94 Pac. 432, 15 L. R. A. (N. S.) 254; *Spiking v. Railway Co.*, 33 Utah 313, 93 Pac. 838; *Pergue v. Railway Co.*, 131 Iowa 710, 109 N. W. 280; *Kramm v. Railway Co.*, 5 St. Ry. Rep. 47, 3 Cal. App. 606, 86 Pac. 738, 903; *Niemeyer v. Railway Co.*, 45 Wash. 170, 88 Pac. 103; *Saytor v. Union Traction Co.*, 40 Ind. App. 381, 81 N. E. 94.

power impelled, not being superior to those of other vehicles, save in the one instance where the vehicle is bound to get out of the way and not obstruct the passage of the car, owing to the inability of the car to travel in any other part of the street. The element of trespass is entirely absent in the case of a person crossing a street railway at any point, and the only care required of him is that which a reasonably prudent man would exercise, having due regard to the rights of others, and assuming that others, including the street car company, will exercise the same care; in fact knowing that such care is imposed by municipal regulation upon the persons operating the street cars. This assumption, of course, does not warrant such a reliance upon it as to neglect means of self-preservation, but is an element of consideration in arriving at the standard of care to govern the particular case.<sup>8</sup> The real

8. *Tacoma Ry. & P. Co. v. Hayes*, (C. C. App., 9th C.) 110 Fed. 496, 23 Am. & Eng. R. Cas. N. S. 58. And see *Traver v. Spokane St. Ry. Co.*, 25 Wash. 225, 65 Pac. 284, 22 Am. & Eng. R. Cas. N. S. 759; *Patterson v. Townsend*, 91 Iowa 725, 59 N. W. 205, 5 Am. Electl. Cas. 442; *Lewis v. Cincinnati St. Ry. Co.*, 10 Ohio S. & C. P. Dec. 53; *Trout v. Altoona & L. V. Elec. Ry. Co.*, 13 Pa. Super. Ct. 17.

In a recent case it was said: "But, if it be conceded that there was any negligence in running the car, it cannot be successfully denied that the plaintiff was plainly guilty of such concurring negligence on her part, up to the very moment of the accident, as to bar her recovery. Indeed, she had the last clear chance for saving herself from harm, and failed to avail herself of it, and she thus became, in the eye of the law, the responsible author of her injury; her negligent act being regarded as its proximate cause. *Crenshaw v. Asheville & B. St. Ry. & Tr. Co.*, 144 N.

C. 314, 6 St. Ry. Rep. 832, 56 S. E. 945. The court said: Speaking of the right of foot passengers on streets and the duty to use their powers of observation when approaching vehicles or street railways, the court, in *Railway Co. v. Block*, 55 N. J. L. 612, 27 Atl. 1067, 22 L. R. A. 374, said: 'The degree of care required [in approaching and crossing street railways] exceeds that required [in approaching and passing foot passengers], not because the right of the foot passenger and the right of the driver of a vehicle differ, but because of the circumstances. The vehicle usually travels at a greater speed. It cannot be so quickly stopped or diverted from its course. A street car cannot deviate from its track; while a passer on foot may quickly stop, turn aside, or even retrace his steps.' On this part of the case the decisions in *Parker v. Railroad Co.*, 86 N. C. 222, and *Bessent v. Railroad*, 132 N. C. 934, 44 S. E. 648, are very much in point. A rational being should not needlessly venture into

question is what a reasonably prudent and cautious man, exercising his faculties for his protection, would have done under all the circumstances, and not what the plaintiff thought, although the result of his deliberate judgment then formed may throw some light upon the subject.<sup>9</sup> The weight of authority seems to support the rule that a person who fails to look and listen before crossing the tracks of a street railroad is guilty of contributory negligence in itself sufficient to warrant a direction of nonsuit or an instruction to the jury that the negligence of the plaintiff precludes his right of recovery, in all cases where the attending conditions are such that reasonable care and prudence would dictate such precaution.<sup>10</sup> And it has been decided that while the evi-

places of peril, and if he does he should use proper precautions to guard against injury. If he fails to do either, and suffers damage in consequence thereof, it must be referred to his rash act and gross inattention to his own security as the true and efficient cause. *Express Co. v. Nichols*, 33 N. J. L. 439, 97 Am. Dec. 722. But numerous courts have stated this principle with substantial uniformity, and we find that it has been applied to facts not unlike those now presented to us, and to the extent of denying the plaintiff's right of recovery. *Canedo v. Street Railway Co.*, 52 La. Ann. 2149, 28 So. 287; *Russell v. Street Ry. Co.*, 83 Minn. 304, 86 N. W. 346; *Doherty v. Street Ry. Co.*, 118 Mich. 209, 76 N. W. 377, 80 N. W. 36; *McQuade v. Street Ry. Co.*, (Sup.) 39 N. Y. Supp. 335; *Moser v. Traction Co.*, 55 Atl. 15, 205 Pa. 481; *McGrath v. Street Ry. Co.*, 66 N. J. L. 312, 49 Atl. 523; *Hall v. Street Railway Co.*, 168 Mass. 461, 47 N. E. 124; *Murray v. Transit Co.*, 1 St. Ry. Rep. 509, 176 Mo. 183, 75 S. W. 611; *Itzkowit v. Railway Co.*, 3 St. Ry. Rep. 408, 186 Mass.

142, 71 N. E. 298; *Dummer v. Electric Ry. Co.*, 108 Wis. 589, 84 N. W. 853; *Stowers v. Street Ry. Co.*, 21 Ind. App. 434, 52 N. W. 710; *Fritz v. Street Ry. Co.*, 105 Mich. 50, 62 N. W. 1007. See also *Doster v. Street Ry. Co.*, 117 N. C. 651, 23 S. E. 449, 34 L. R. A. 481."

9. *Jeddey v. Boston & N. St. Ry. Co.*, 198 Mass. 232, 6 St. Ry. Rep. 754, 84 N. E. 316.

10. *Barrett v. Columbia Ry. Co.*, 20 App. D. C. 381; *Indianapolis St. Ry. Co. v. Tenner*, 1 St. Ry. Rep. 178 (Ind. App.), 67 N. E. 1044; *Judge v. Elkins*, 1 St. Ry. Rep. 300, 183 Mass. 229, 66 N. E. 708; *Moore v. Lindell Ry. Co.*, 1 St. Ry. Rep. 492, 176 Mo. 528, 75 S. W. 672; *Wolf v. City & Suburban Ry. Co.*, 1 St. Ry. Rep. 667, 45 Oreg. 446, 72 Pac. 329; *Moser v. Union Trac. Co.*, 1 St. Ry. Rep. 705, 205 Pa. St. 481, 55 Atl. 15; *Kappus v. Met. St. Ry. Co.*, 82 App. Div. (N. Y.) 13, 81 N. Y. Supp. 442; *Murray v. St. Louis Transit Co.*, 1 St. Ry. Rep. 509, 176 Mo. 183, 75 S. W. 611; *Little v. Third Ave. R. Co.*, 83 App. Div. (N. Y.) 330, 82 N. Y. Supp. 55; *Brown v. Elizabeth*,

dence in an action for personal injuries caused by a collision with an electric street car establishes the fact that the plaintiff neither looked to see nor listen to hear whether a car was approaching and he could have done both with but slight effort, he is chargeable with contributory negligence as matter of law.<sup>11</sup> The contrary rule that it is not negligence, as a matter of law, but that it is a question for the jury is held in a number of States.<sup>12</sup> Where the evidence of the plaintiff shows actual negligence on the part of the company, and the question of contributory negligence of plaintiff depends on a variety of circumstances, from which different minds may reasonably arrive at different conclusions as to whether contributory negligence should be found or not, the question should be submitted to the jury under proper instructions, and it is error in such a case for the court to direct verdict for the defendant.<sup>13</sup>

etc., R. Co., (N. J.) 54 Atl. 824; Creamer v. West End St. Ry. Co., 156 Mass. 320; Taylor v. Missouri, etc., R. Co., 86 Mo. 457; Trauber v. Third Ave. R. Co., 80 App. Div. (N. Y.) 37, 80 N. Y. Supp. 231; Martin v. Third Ave. R. Co., 27 App. Div. (N. Y.) 52, 50 N. Y. Supp. 284; Kitay v. Brooklyn, etc., R. Co., 23 App. Div. (N. Y.) 228, 48 N. Y. Supp. 982; Cury v. Union Elec. Ry. Co., 86 Hun (N. Y.) 559, 33 N. Y. Supp. 728; Van Patten v. Schenectady Ry. Co., 82 Hun (N. Y.) 494, 30 N. Y. Supp. 501. See also other cases cited under sections 30 to 35.

The duty on the part of pedestrians, drivers of vehicles, and others, having occasion to use a public street crossing over which a street railway is operated, to look and listen for approaching cars, is imposed by the general rule requiring them to exercise reasonable care and prudence in using such crossing. Failure, under such circumstances, to make use of the faculties of sight and hearing,

is negligence *per se*, if it appears that a reasonable and fair use thereof would have disclosed the danger and enabled the party to have avoided it. Riedel v. Wheeling Traction Co., 63 W. Va. 522, 6 St. Ry. Rep. 491, 61 S. E. 821.

**11.** Volosko v. Interurban St. Ry. Co., 190 N. Y. 206, 6 St. Ry. Rep. 249, 82 N. E. 1090.

**12.** Campbell v. Los Angeles Tract. Co., 137 Cal. 565, 70 Pac. 624; Clark v. Burnett, 123 Cal. 278, 55 Pac. 908; McNulta v. Norgren, 90 Ill. App. 491; Dennis v. North Jersey St. Ry. Co., 64 N. J. L. 439, 45 Atl. 807; North Jersey St. Ry. Co. v. Schwartz, 66 N. J. L. 437, 49 Atl. 683; Iron Mt. R. Co. v. Dies, 98 Tenn. 655, 41 S. W. 860; Burian v. Seattle Elec. Co., 26 Wash. 606, 67 Pac. 214; Traver v. Spokane St. Ry. Co., 25 Wash. 325, 65 Pac. 284. See also cases cited under sections 414 to 421.

**13.** Bremer v. St. Paul City Ry. Co., 107 Minn. 326, 6 St. Ry. Rep. 543, 120 N. W. 382.

So it is said that no absolute standard for determining the question of contributory negligence can be declared which is not inaccurate, and that each case must be determined upon its own facts, and that the question is primarily one for the jury.<sup>14</sup> But there is no absolute duty incumbent on one who is about to cross a street railway track to stop, as well as to look and listen.<sup>15</sup> A traveler on a street has a right to rely on the exercise of prudence conforming to the standard of law by the motorman, and is not bound to anticipate negligence on his part.<sup>16</sup> In an action against a street railway company for injuries received by plaintiff being struck by a car while she was attempting to cross the street, the fact that plaintiff had no prior actual knowledge of the location of, or the danger causing, her injury, is not conclusive that she was not guilty of contributory negligence. The rule in such cases is that if the person have no actual knowledge of the danger causing the injury, and could not by the exercise of reasonable care have discovered it, he cannot be said to be guilty of contributory negligence. But, if ignorant of the danger, and the exercise of reasonable care would have made it known, and there be a failure to exercise such care, he is chargeable with negligence, and to the same extent as though perfectly familiar with the location and danger.<sup>17</sup> Although the question whether a person was justified in making an attempt to cross a track before an approaching car reaches him is for the jury, it is well settled that the person crossing the street has no right to make nice calculations and accept an imminent danger.<sup>18</sup>

§ 413. *Contributory negligence generally continued.* — While a pedestrian who reaches a street car track in time to cross safely if the speed of an approaching car is not increased is not negligent

14. *Cincinnati L. & O. Elec. St. Ry. Co. v. Stahle*, 37 Ind. App. 539, 4 St. Ry. Rep. 266, 76 N. E. 551.

15. *Frank v. St. Louis Transit Co.*, (Mo. App.) 73 S. W. 239.

16. *Bremer v. St. Paul City Ry. Co.*, 107 Minn. 326, 6 St. Ry. Rep. 543, 120 N. W. 382.

17. *Russell v. Minneapolis St. Ry. Co.*, 83 Minn. 304, 86 N. W. 346.

18. *Ames v. Waterloo, etc., R. T. Co.*, *supra*; *Terien v. St. Paul City R. Co.*, 70 Minn. 532; *Hickey v. St. Paul City R. Co.*, 60 Minn. 119; *Watson v. Mound City St. R. Co.*, 133 Mo. 246.

in proceeding, yet, if it would be apparent to a person of ordinary prudence that the car will overtake him unless the speed is slackened, it is negligent for him to proceed, though he have an equal right with the company to the use of the street.<sup>19</sup> But a pedestrian, after signaling an approaching car to stop at a place where passengers are customarily taken on, is not negligent as a matter of law, in proceeding diagonally across the tracks to such place, and in assuming that the motorman, as the car approaches the stopping place, will use reasonable care to permit her to cross in safety, or in failing to look behind her after she had started on her course across the tracks.<sup>20</sup> One is not negligent, as matter of law, in driving along a street railroad track, seated in the center of a low cart immediately behind his horse so as to be unable to observe the upturned end of a rail forming part of the track; but, if the rail is plainly visible for a great distance, and should have been observed by him in the exercise of ordinary care, he is so negligent that he cannot recover for an injury caused by coming in contact with the rail.<sup>21</sup> And one who in daylight undertakes, with full knowledge of the danger involved, to drive a horse over a temporary switch of a street railroad, into which granite blocks have been loosely thrown, will be held to have assumed the risk.<sup>22</sup> Where the evidence discloses that the electric car which struck plaintiff was running at a moderate and safe rate of speed, was under the control of the motorman, that he was sounding his warning gong, that he stopped the car in a brief space of time and distance, and, from the circumstances attending the accident, it is evident that the plaintiff ran into the car without paying any heed whatsoever to its approach, he cannot recover.<sup>23</sup> Where a traveler

**19.** *Du Frane v. Met. St. Ry. Co.*, 83 App. Div. (N. Y.) 298, 82 N. Y. Supp. 1; *Freeman v. Brooklyn H. R. Co.*, 82 App. Div. (N. Y.) 521, 81 N. Y. Supp. 828.

**20.** *Copeland v. Met. St. Ry. Co.*, 78 App. Div. (N. Y.) 418, 79 N. Y. Supp. 1054. But see *Griffith v. Denver Consol. Tramway Co.*, 14 Colo. App. 504, 61 Pac. 46.

**21.** *Bradwell v. Pittsb. & W. E. Pass. Ry. Co.*, 153 Pa. St. 105, 25 Atl. 623.

**22.** *Watson v. Brooklyn City R. Co.*, 14 Misc. Rep. (N. Y.) 405, 70 St. Rep. (N. Y.) 757, 35 N. Y. Supp. 1039.

**23.** *Canada v. New Orleans & C. R. Co.*, 52 La. Ann. 2149, 28 So. 287.

emerges rapidly from a cross street, and attempts to cross a double-track railway immediately behind a passing car, giving no notice of his coming to the motorman on the other track, it is a danger from which such traveler must be his own protector.<sup>24</sup> It is negligence to come from behind obstructions into a place of danger without taking any precaution whatever to anticipate or avoid the danger incident to the act. It is the duty of a person in such a case to pay attention to his surroundings and employ his natural faculties and exert due diligence to avoid such danger.<sup>25</sup>

§ 414. **Contributory negligence of drivers of vehicles in going on or across tracks.** — It is the duty of the driver of a vehicle about to cross street car tracks, on observing the rapid approach of a street car, to take into consideration the fact that it can neither turn out, nor stop instantly; but if, on such consideration, he enters on the track when the car is so far away and approaching at such speed that, by the exercise of reasonable diligence, it can be stopped, he is not thereby guilty of negligence.<sup>26</sup> A driver has a right to cross a street railway track, although he may see a car in the distance, if he may reasonably suppose he can cross before it reaches him.<sup>27</sup> When a team is driven upon a street car track with a car approaching a block or less away, the driver and the motorman assume each a reciprocal duty. The one must use ordinary prudence to avoid receiving injury; the other must use ordinary prudence to avoid inflicting injury. And, when injury is inflicted, it is ordinarily for the jury, under proper instructions, to say who has neglected the duty and who has been guilty of the negligence. And it is only when, as in the cases above cited, the situation as to negligence is so plain, clear, and unequivocal as to admit of but one answer, that the court may declare negligence as a matter of law and enter a judgment of nonsuit.<sup>28</sup> And it cannot

24. *Schutt v. Shreveport Belt Ry. Co.*, 109 La. 500, 33 So. 577.

25. *Ames v. Waterloo, etc., R. T. Co.*, 120 Iowa 640, 95 N. W. 161, 1 St. Ry. Rep. 199, and notes.

26. *Toledo Electric St. Ry. Co. v.*

*Westenhuber*, 22 Ohio C. C. 67, 12 Ohio C. D. 22.

27. *Birmingham Ry., L. & P. Co. v. McClain*, (Ala.) 6 St. Ry. Rep. 470, 50 So. 149.

28. *Henry v. Seattle Electric Co.*,

be said as a matter of law that one who drives upon or across or by reason of passing teams is compelled to stop on a street railway track, the approaching car being at some considerable distance, is guilty of such negligence as a matter of law will preclude a recovery. The driver has a right to assume that the car is under control, or will be controlled, when the motorman sees him upon the track, and that he will not run into him. It is for the jury to say whether he or the motorman was guilty of that negligence — the last efficient cause — but for which the accident would not have happened.<sup>29</sup> But one who, thinking that he can drive across the street in front of an electric car, which he sees approaching, attempts to do so, with the result that there is a collision when the front wheels of the wagon are on the track, is guilty of contributory negligence.<sup>30</sup> It is not negligence for a person to drive across street railway tracks whenever and wherever he may have occasion to do so, and this right of crossing the tracks is not confined to street crossings. The question of negligence in such cases depends upon the proximity or remoteness of the car, its speed, and other circumstances. It is the duty of a traveler to look out for himself, and to exercise such ordinary care as would be exercised by a reasonably prudent person under attendant circumstances. The duty imposed upon persons crossing steam railway tracks to stop, look, and listen is not rigidly applied to persons traveling a street used by a street railway. The failure of a person to look for approaching cars before crossing street railway tracks does not place him in any worse position than if he had looked and seen the car; and, therefore, if, at the time when he started to drive across the track, the car was at such a distance that an attempt to cross after having seen it would not have been contributory negligence, his failure to

55 Wash. 444, 6 St. Ry. Rep. 438,  
104 Pac. 776.

**29.** *Keefe v. Seattle Electric Co.*,  
55 Wash. 448, 6 St. Ry. Rep. 434,  
104 Pac. 774, citing *Hall v. Railroad*  
*Co.*, 124 Mo. App. 661, 101 S. W.  
1137; *Cole v. Met. St. Ry. Co.*, 121  
Mo. App. 612, 97 S. W. 555; *Indiana*

*Union Traction Co. v. Pheanis*, 43 Ind.  
App. 653, 85 N. E. 1040; *Deitsch v.*  
*Trans. St. Mary's Trac. Co.*, 155  
Mich. 15, 118 N. W. 489; *Adams v.*  
*Union El. Co.*, 138 Iowa 487, 116  
N. W. 332.

**30.** *Tyson v. Union Tract. Co.*, 199  
Pa. St. 264, 48 Atl. 1078.

look for the car will not preclude his recovery. A person is not guilty of contributory negligence merely because he attempts to cross a street railway when a car is approaching. If that were so, he could never attempt to cross such a track in the crowded part of a city, where there is practically always an approaching car. In such case, negligence depends upon the proximity or remoteness of the car, its speed, and all other circumstances surrounding the occurrence. It is not negligence *per se* for one to cross a street railway track in front of an approaching car which he has seen, and which is not dangerously near.<sup>31</sup> One is not bound, at his peril, to know, before attempting to cross a street railway track, that a collision between his vehicle and an approaching car will not occur, but he is only required to make such observation as would convince a reasonably prudent man in a like situation that the passage could be made in safety.<sup>32</sup> Whether or not a plaintiff is guilty of contributory negligence is, as a general proposition, a question of fact to be determined by the jury, and it is only where it clearly appears from the uncontradicted evidence that the plaintiff has by his own act contributed to the injury he has received, that the court is justified in determining that question as a matter of law.<sup>33</sup> A driver is, as matter of law, guilty of contributory negligence precluding recovery for injuries received in a collision with an electric car, in acting upon the assumption that, if he reached the crossing first, he was entitled to go on, and that the duty of avoiding a collision rested entirely with the motorman, and, with a full knowledge of the situation, placing himself in a

**31.** *Philbin v. Denver City Tramway Co.*, 36 Colo. 331, 85 Pac. 630.

**Negligence of driver a question for jury.** — *Chaput v. Haverhill G. & D. St. Ry. Co.*, 194 Mass. 218, 5 St. Ry. Rep. 446, 80 N. E. 597; *Stubbs v. Boston & N. St. Ry.*, 193 Mass. 513, 5 St. Ry. Rep. 447, 79 N. E. 795; *Percell v. Met. St. Ry. Co.*, 126 Mo. App. 43, 6 St. Ry. Rep. 741, 103 S. W. 115.

**32.** *Lawler v. Hartford St. R. Co.*,

72 Conn. 74, 43 Atl. 545; *Saunders v. City & S. R. Co.*, 99 Tenn. 130, 41 S. W. 1031, 2 Chic. L. J. Wkly. 522.

**33.** *Engelman v. Met. St. Ry. Co.*, 133 Mo. App. 514, 6 St. Ry. Rep. 484, 113 S. W. 700; *Cohen v. Met. St. Ry. Co.*, 63 App. Div. (N. Y.) 165, 71 N. Y. Supp. 268; *Kettle v. Turl*, 162 N. Y. 255, 56 N. E. 626; *McDonald v. Met. St. Ry. Co.*, 167 N. Y. 66, 60 N. E. 282.

position of manifest danger.<sup>34</sup> To constitute contributory negligence there must be a want of ordinary care, under all the circumstances of the case, contributing to the injury as an efficient and proximate cause thereof, and there is no want of ordinary care where, under all the circumstances and surroundings of the case, the person did or omitted nothing which an ordinarily careful and prudent person similarly situated would not have done or omitted.<sup>35</sup> The driver of a team who, on approaching a street railway track to cross it, sees a car approaching at such a distance as apparently to make it safe to cross, is not negligent *per se* in attempting to cross without looking a second time, as the car has no priority of way at the crossing.<sup>36</sup> It is not contributory negligence, in a person driving a team attached to a loaded wagon about to cross a street car track, to rely on the ability of the motorman in charge to so control his car as to avoid a collision.<sup>37</sup> Trolley cars and the drivers of ordinary carriages have equal rights upon the public streets and street crossings. The first to reach the crossing has the right to pass over first, but if it appears that the motorman does not intend to respect this right of priority, and that the driver cannot, in the exercise of reasonable prudence, exercise his right, he is guilty of contributory negligence if he fails to wait or turn aside, if he can do so by the use of due care, and thus protect himself from injury.<sup>38</sup> The mere fact that the servant of the plaintiff failed to look before turning onto the track is insufficient to charge the plaintiff with contributory negligence;

**34.** *Smith v. Electric Tract. Co.*, 187 Pa. St. 110, 40 Atl. 966, 42 W. N. C. 351. See also *Robinson v. Crosstown St. Ry. Co.*, 118 App. Div. (N. Y.) 343, 6 St. Ry. Rep. 747, 103 N. Y. Supp. 58; *Ward v. Brooklyn Heights R. Co.*, 115 App. Div. (N. Y.) 104, 6 St. Ry. Rep. 735, 100 S. W. 671.

**35.** *Flannagan v. St. Paul City R. Co.*, 68 Minn. 300, 71 N. W. 379.

**36.** *Watson v. Minneapolis St. R. Co.*, 53 Minn. 551, 55 N. W. 742.

**37.** *Chicago City Ry. Co. v. Martensen*, 100 Ill. App. 306; *affd.*, 198 Ill. 511, 64 N. E. 1017.

**38.** *Earle v. Consol. Tract. Co.*, 64 N. J. L. 573, 46 Atl. 613; *Scannell v. Boston Elev. Ry. Co.*, 176 Mass. 170, 57 N. E. 341; *West Chicago St. R. Co. v. Maday*, 88 Ill. App. 49; *affd.*, 188 Ill. 308, 58 N. E. 933.

all the facts and circumstances as they existed at the time must be taken into consideration.<sup>39</sup>

§ 415. **Contributory negligence of drivers of vehicles in going on or across tracks — Application of rules.** — Where one driving toward a street car track sees a car approaching, and, supposing that he can cross the track before the car, does not look again until he is on the track, and he is struck and injured by the car, his contributory negligence will prevent a recovery against the company.<sup>40</sup> Where a person backed an automobile having no lights on it onto a car track, and although he expected a car to pass at about that time, did not look around to see where the car was, it was declared that his conduct was negligent.<sup>41</sup> A truckman who attempts to drive across a railroad track in front of an approaching motor when it was only fifty to seventy-five feet away was held guilty of contributory negligence.<sup>42</sup> Driving across the track of a cable street railroad, in front of a car approaching in the same block, has been held to be contributory negligence.<sup>43</sup> One who, without ordinary precautions, attempts to drive across an electric railway track in front of a rapidly approaching car, and, on finding himself unable to do so, attempts to turn in the same direction the car is going, but, because of the slipping of his horse, collides with a car coming from the other direction, by which he is thrown from his wagon under the first car, is guilty of such contributory negligence as will prevent recovery, where the drivers of both cars

**39.** *Carroll v. Connecticut Co.*, 82 Conn. 513, 6 St. Ry. Rep. 354, 74 Atl. 897, citing *Fay v. Hartford & S. St. Ry. Co.*, 81 Conn. 330, 71 Atl. 364.

**40.** *Brown v. Pittsburg, etc., Tract. Co.*, 14 Pa. Super. Ct. 594.

**41.** *Birch v. Athol & O. St. Ry. Co.*, 198 Mass. 257, 6 St. Ry. Rep. 736, 84 N. E. 310.

**42.** *Clancy v. Troy & Lans. R. Co.*, 88 Hun (N. Y.) 496, 68 St. Rep. (N. Y.) 789, 34 N. Y. Supp. 877; *Chicago North Shore St. R. Co. v.*

*McCarthy*, 66 Ill. App. 667, attempting to cross track when a car moving twenty miles an hour was seventy-five feet away.

**43.** *Rohe v. Third Ave. R. Co.*, 10 Misc. Rep. (N. Y.) 740, 64 St. Rep. (N. Y.) 500, 31 N. Y. Supp. 797; *Hamilton v. Third Ave. R. Co.*, 6 Misc. Rep. (N. Y.) 382, 56 St. Rep. (N. Y.) 397, 26 N. Y. Supp. 754, it is negligence *per se* to drive across a track in front of a cable street car approaching in full view within forty feet, at a speed of ten miles an hour.

did everything in their power to stop after discovering his dangerous position.<sup>44</sup> Driving at a walk across an electric street railway track constitutes contributory negligence, when the driver has seen a car approaching very fast on a down grade, although he continues to proceed slowly on the theory that the car will stop on the nearest side of the street.<sup>45</sup> A plaintiff was held guilty of contributory negligence, as a matter of law, where he looked and listened before starting his team from the gutter of the street in the middle of a block twenty feet from the rail of defendant's tracks, on which the collision occurred, and then drove diagonally across the tracks, in front of an approaching electric car, which he observed, before starting, to be approaching at a distance of 321 feet, but did not look again until the car was practically upon him, although it was running at an excessive and unusual rate of speed.<sup>46</sup> One who starts to drive his team across a street a short distance in front of a rapidly approaching car is guilty of negligence contributing to the collision.<sup>47</sup> Where a traveler in an unlighted wagon drove onto the downtown track of a street railway, when both the downtown and uptown cars were each about half a block away, and waited until the uptown car passed him, but before he could cross the uptown track, and as he was starting to do so, the rapidly running downtown car struck his wagon, he was held guilty of contributory negligence, in waiting on the track, warranting the granting of a nonsuit.<sup>48</sup> But, where plaintiff, driving on a city street, saw a street car near him, going uptown on the nearest track and a car coming downtown on the other track, at rapid speed, some three hundred feet away; he checked his horse until the

44. *Graff v. Detroit City St. R. Co.*, 109 Mich. 77, 67 N. W. 815, 5 Am. & Eng. R. Cas. N. S. 447, 3 Det. Leg. N. 12.

45. *Smith v. Electric Tract. Co.*, 6 Pa. Dist. Rep. 471, 40 W. N. C. 486; *Meyer v. Brooklyn H. R. Co.*, 9 App. Div. (N. Y.) 179, 41 N. Y. Supp. 92, driving at a walk diagonally across at a place not a crossing, while an approaching car is only 150

feet away, without notifying the motorman in any way of intention to cross, is negligence.

46. *Cupps v. Consol. Tract. Co.*, 13 Pa. Super. Ct. 630.

47. *Bornscheuer v. Consol. Tract. Co.*, 198 Pa. St. 332, 47 Atl. 872.

48. *Vogts v. Met. St. Ry. Co.*, 74 N. Y. Supp. 844, 36 Misc. Rep. (N. Y.) 799.

nearest car had passed and drove back of it; when he reached the point where he could see the other car, his horse was on the track, and the car was coming at a rapid rate, and only twenty or thirty feet away; he whipped up his horse, but the hind wheels of his buggy were struck by the car, throwing him to the ground, and he was injured — it was held that the court properly refused to hold that plaintiff was guilty of contributory negligence in going on the track in front of the car, knowing that it was running at such rapid rate, since plaintiff had a right to presume that the speed of the car would be checked on approaching the crossing.<sup>49</sup> Where plaintiff was injured by the overturning of a sleigh on a ridge of hard snow between defendant's tracks, caused by the manner in which the defendants had operated a snow plow, it could not be said as a matter of law that plaintiff was negligent where the evidence showed that the snow was piled quite high between the outer rails of each one of defendant's tracks and each sidewalk, so that it was practically necessary to drive over the railway tracks; that he had turned out upon the left-hand track for the purpose of allowing a street car to pass him, and that in attempting to turn back, so as to be upon the right-hand side of that part of the street, which was then practicable for travel, his sleigh slid down the ridge of snow between the tracks and was overturned.<sup>50</sup> And where in an action for personal injuries sustained from a collision with one of defendant's cars while plaintiff was driving along the track, it appeared that the difficulty of passing at the sides of the tracks was so great that nearly all teams drove along the tracks; that the defendant was chiefly responsible for the condition of the street as it had frequently thrown out snow and run snow plows over the tracks, the driver of the sleigh was not negligent in driving on the track and his driving thereon, taken in connection with the condition of the snow, was the direct and proximate cause of the accident.<sup>51</sup> When a driver approaches a cross street in the daytime,

**49.** *Bertsch v. Met. St. Ry. Co.*, 74 N. Y. Supp. 238, 68 App. Div. (N. Y.) 228; *affd.*, 173 N. Y. 634, 66 N. E. 1104.

**50.** *McMahon v. Lynn & Boston R. Co.*, 191 Mass. 295, 4 St. Ry. Rep. 451, 77 N. E. 826.

**51.** *Miller v. Boston & N. St. Ry.*

and sees, a block distant from the street railroad crossing, a motor car approaching at the rate of twenty miles an hour, with its motor-man not looking ahead, he is guilty of contributory negligence if he attempts to cross when the motor car is not more than fifty feet away from him.<sup>52</sup> Where the driver of a wagon, about to pass over a street car crossing, sees a car approaching at full speed a block away, persists in his attempt to pass over the crossing, and is struck by such car and injured, he is guilty of negligence in failing to use any diligence to keep off the track and avoid a collision.<sup>53</sup> One who checks his horse almost to a stop and looks for street cars as he reaches the house line of a street, and then gives no further attention to cars, but drives on thirty-two feet, slowly, to allow a wagon to pass in front of him, and goes directly in front of a moving car, is guilty of contributory negligence.<sup>54</sup> Where the driver of a wagon, while in plain view of a street car approaching at a speed of from eight to twelve miles, which is shown to be a usual rate, and when within 130 feet of the car, hurriedly attempts to cross in front thereof, and a collision occurs, though the motor-man immediately attempts to stop the car, the driver is guilty of contributory negligence sufficient to authorize a directed verdict in favor of the company.<sup>55</sup> A driver is not guilty of negligence, as matter of law, in attempting to cross a street railway track in front of a trolley car about three hundred feet away, which he observes is coming in his direction at great speed, in view of his right to assume that the car is furnished with appliances to reduce speed and to stop, and with a motorman to make use of such appliances, and that it will not continue to run in violation of a law limiting the speed of vehicles using public streets to that which is compatible with a safe use thereof by other vehicles.<sup>56</sup> A driver

Co., 197 Mass. 535, 6 St. Ry. Rep. 541, 83 N. E. 990.

**52.** *Seggerman v. Met. St. Ry. Co.*, 77 N. Y. Supp. 905, 38 Misc. Rep. (N. Y.) 374; *affd.*, 80 N. Y. Supp. 1147.

**53.** *Goodman v. West Chicago St. Ry. Co.*, 101 Ill. App. 474.

**54.** *Burke v. Union Tract. Co.*, 48 Atl. 470, 198 Pa. St. 497.

**55.** *Watermolen v. Fox River Elec., etc., R. Co.*, 110 Wis. 153, 85 N. W. 663.

**56.** *Consol. Tract. Co. v. Lambertson*, 59 N. J. L. (30 Vroom) 297, 36 Atl. 100; *affd.*, 60 N. J. L. 452,

is not *per se* guilty of negligence in attempting, after reaching a point five feet east of the easterly track of a street railway company, while driving at the rate of eight miles an hour, to cross the westerly track in front of an approaching train which is three-quarters of a block away, as he has a right to rely upon the observance by the gripman of reasonable care to avoid a collision.<sup>57</sup> One is not, as matter of law, guilty of negligence in driving at dusk upon a horse railroad track immediately after a car has passed in one direction, which hides his view of a car approaching on the other track.<sup>58</sup> Attempting to drive a wagon across defendant's car tracks, when its trolley car was more than seventy feet away and could have been stopped in one-fifth of that distance, is not contributory negligence, as matter of law.<sup>59</sup> Where plaintiff

38 Atl. 683; *Ledwidge v. St. Louis Transit Co.*, (Mo.) 73 S. W. 1008, where plaintiff saw a car about 150 feet away, approaching at a speed of twenty miles an hour, but did not stop or whip up his horses until the car was within forty or fifty feet from him, and it struck his hack before he got across the track, and injured him, it was held that he had no right to assume that those in charge of the car would regulate its speed to conform to that limited by the ordinance, and that he was guilty of contributory negligence.

**57.** *Hunter v. Third Ave. R. Co.*, 46 N. Y. Supp. 1010, 21 Misc. Rep. (N. Y.) 1; affg. 20 Misc. Rep. (N. Y.) 432, 45 N. Y. Supp. 1044; *Shanley v. Union R. Co.*, 14 Misc. Rep. (N. Y.) 442, 35 N. Y. Supp. 1030, 70 St. Rep. (N. Y.) 734, one is not guilty of contributory negligence, as a matter of law, in attempting to drive across a street railroad track at a dog trot after observing, when five yards from the track, a car approaching at a distance of 200 yards; *McDonald v. Third Ave. R. Co.*, 16

Misc. Rep. (N. Y.) 52, 37 N. Y. Supp. 639, 73 St. Rep. (N. Y.) 233, nor in attempting to drive across a cable car track, although when he is within five feet of the nearer track he sees a car on a farther track 150 feet distant; *Reilly v. Third Ave. R. Co.*, 16 Misc. Rep. (N. Y.) 11, 73 St. Rep. (N. Y.) 289, 37 N. Y. Supp. 593; affg. 14 Misc. Rep. (N. Y.) 445, 70 St. Rep. (N. Y.) 733, 35 N. Y. Supp. 1030, nor in attempting to drive a two-wheeled cart across a street railway track at a street crossing, when a car is eighty feet distant, just as the head of the horse reaches the track.

**58.** *Thoresen v. La Crosse City R. Co.*, 94 Wis. 129, 68 N. W. 548, 6 Am. & Eng. R. Cas. N. S. 101.

**59.** *Bruss v. Met. St. Ry. Co.*, 66 App. Div. (N. Y.) 554, 73 N. Y. Supp. 256; *Smith v. Met. St. Ry. Co.*, 66 App. Div. (N. Y.) 600, 73 N. Y. Supp. 254; *Lawson v. Met. St. Ry. Co.*, 40 App. Div. (N. Y.) 307, 57 N. Y. Supp. 997; affd., 166 N. Y. 589, 59 N. E. 1124; *Costello v. Third Ave. R. Co.*, 161 N. Y. 320,

started to drive across defendant's street railway track at a proper distance from defendant's car, which was suddenly moved at an accelerated speed, whereupon plaintiff endeavored to escape by turning and driving along the track, it was held that a recovery for a subsequent collision should not be defeated because the course taken by plaintiff was not the safer one.<sup>60</sup> An attempt to drive a horse and cart across a street in front of a trolley car five hundred feet away is not contributory negligence, as a matter of law, but a question for the jury.<sup>61</sup> A driver of a beer wagon, with heavy horses not capable of good speed, is not bound to wait until an approaching street car which he sees sixty to eighty feet away has passed him, if as a prudent, careful driver, he deems it safe to cross the track.<sup>62</sup> One was not guilty of negligence, as a matter of law, in being upon a cable railway track at the time of a collision with a car, when he could see the track for a distance of one hundred feet and saw no car approaching immediately before the accident, which was due to the fact that the car could not be stopped within that distance after an alarm given.<sup>63</sup> One is not guilty of contributory negligence, as matter of law, in attempting to drive across a trolley railroad track with a heavily loaded wagon, where he looks before attempting to cross and no car is in sight, and his wagon is struck when almost across by a rapidly moving car;<sup>64</sup> nor in attempting

55 N. E. 897; *Henarie v. N. Y. Cent., etc., R. Co.*, 166 N. Y. 281, 59 N. E. 901; *Brozek v. Steinway R. Co.*, 10 App. Div. (N. Y.) 360, 41 N. Y. Supp. 1017; *Dise v. Met. St. Ry. Co.*, 22 Misc. Rep. (N. Y.) 97, 48 N. Y. Supp. 551; affg. 47 N. Y. Supp. 1134, 21 Misc. Rep. (N. Y.) 790, where the car was 150 feet away; *Kerr v. Atlantic Ave. R. Co.*, 10 Misc. Rep. (N. Y.) 264, 30 N. Y. Supp. 1070, 63 St. Rep. (N. Y.) 310, where the car was ninety feet distant.

**60.** *Nicholsberg v. Second Ave. R. Co.*, 11 Misc. Rep. (N. Y.) 432, 65 St. Rep. (N. Y.) 273, 32 N. Y. Supp. 130; *Quill v. N. Y. Cent., etc., R. Co.*,

16 Daly (N. Y.) 313, 126 N. Y. 629; *Lowery v. Manhattan R. Co.*, 99 N. Y. 158, 1 N. E. 608.

**61.** *Mackie v. Brooklyn City R. Co.*, 10 Misc. Rep. (N. Y.) 4, 62 St. Rep. (N. Y.) 653, 30 N. Y. Supp. 539.

**62.** *Witzel v. Third Ave. R. Co.*, 3 Misc. Rep. (N. Y.) 561, 52 St. Rep. (N. Y.) 521, 23 N. Y. Supp. 317; *Hergert v. Union R. Co.*, 25 App. Div. (N. Y.) 218, 49 N. Y. Supp. 307.

**63.** *Cross v. California Cable St. R. Co.*, 102 Cal. 313, 36 Pac. 673.

**64.** *Kilbane v. Westchester Elec. R. Co.*, 19 Misc. Rep. (N. Y.) 184, 43 N. Y. Supp. 278.

to drive across an electric railroad track on a dark, windy night, after stopping, looking, and listening for a car and seeing none.<sup>65</sup> A driver of an ice wagon is not, as matter of law, guilty of contributory negligence in starting to cross a street railroad track, when an electric car is standing still 130 feet distant.<sup>66</sup> A driver is justified in assuming that it is safe for him to drive into the street from a cellar which is being excavated on the side of a street, when he is sixty-five feet from the point where the street railway curves into the street and no car is in sight.<sup>67</sup> One who on reaching a street crossing sees a car 250 feet distant is not, as matter of law, guilty of contributory negligence in attempting to drive over the track in front of a car, where he could have done so in safety if the car had not been running at an unusual rate of speed.<sup>68</sup> Negligence is not chargeable to one driving a buggy in attempting to cross an electric railway track in front of an approaching car, when the crossing could be safely made if the motorman exercised ordinary care and had reasonable control of the car, unless lack of such control and care was apparent to the former at the time.<sup>69</sup> A driver of a wagon on a public street, approaching a street car intersection, who sees an electric car approaching him about 230 feet away, has a right to rely on the duty resting on the motorman to so manage and control his car as to avoid a collision, and not to subject him to unnecessary danger, and his so relying was not contributing to the accident which ensued.<sup>70</sup> A traveler in a carriage who approached a street crossing over double street car tracks, and, after waiting for two cars to pass on one track and one on the other, attempted to cross and was run down by a fourth car, which had been concealed from

**65.** *Tompkins v. Scranton Tract. Co.*, 3 Pa. Super. Ct. 576.

**66.** *McCormack v. Nassau Elec. R. Co.*, 16 App. Div. (N. Y.) 24, 44 N. Y. Supp. 684, rehearing denied, 18 App. Div. (N. Y.) 333, 46 N. Y. Supp. 230.

**67.** *Walsh v. Atlantic Ave. R. Co.*, 23 App. Div. (N. Y.) 19, 48 N. Y. Supp. 343.

**68.** *Callahan v. Philadelphia Tract. Co.*, 184 Pa. St. 425, 41 W. N. C. 509, 39 Atl. 222.

**69.** *Saunders v. City & S. R. Co.*, 99 Tenn. 130, 41 S. W. 1031, 2 Chic. L. J. Wkly. 522.

**70.** *Chicago General Ry. Co. v. Carroll*, 91 Ill. App. 356; *affd.*, 189 Ill. 273, 59 N. E. 551.

his view by one of the other cars which had stopped, was held not guilty of a want of ordinary care; and a traveler crossing the track at a street crossing where two street railroads also crossed, under such circumstances that, owing to the darkness and congested condition of the streets, he was required to watch on three sides, and could not safely look in one direction, was held not guilty of contributory negligence, when his wagon was struck by a car running without headlights or ringing of the bell.<sup>71</sup> The driver of a coach approaching a street car crossing was entitled to the presumption that the car would be moved at that point under a reasonable state of control, so that it might be readily stopped in case of emergency, to give him an opportunity to get over in safety; and the fact that the driver of a vehicle approaching a crossing sees a car running at a rapid rate three hundred feet distant is not notice to him of an intention to continue such rate of speed in disregard of the rights of others at the crossing.<sup>72</sup> For one to attempt to drive across a street railway track where there is a slope of eleven to fourteen inches in the snow in a distance of one and half to three feet is not negligence *per se*.<sup>73</sup> One is not negligent in attempting to drive across a street railway track at a street crossing when an approaching car is seventy-five feet distant.<sup>74</sup> Where plaintiff was injured at a street railroad crossing, findings that plaintiff, having average capacity to see and hear, and knowing that his horse was afraid of cars, and that cars frequently ran on a certain track, attempted to drive across the track without stopping, though his view was obstructed by buildings and trees, but that he looked and listened, but did not see the car until his horse was going on the track, which was fifteen and half feet from the curb, do not show contributory negligence authorizing judg-

**71.** *Tesch v. Milwaukee Elec., etc.*, R. Co., 108 Wis. 593, 84 N. W. 823; *R. F. Stevens Co. v. Brooklyn H. R. Co.*, 68 N. Y. Supp. 1088, 59 App. Div. (N. Y.) 23.

**72.** *Reilly v. Brooklyn Heights R. Co.*, 72 N. Y. Supp. 1080, 65 App. Div. (N. Y.) 453; *Bertsch v. Met.*

*St. Ry. Co.*, 74 N. Y. Supp. 238, 68 App. Div. (N. Y.) 228; *affd.*, 66 N. E. 1104.

**73.** *Gerrard v. La Crosse City R. Co.*, 113 Wis. 258, 89 N. W. 125.

**74.** *Schoener v. Met. St. Ry. Co.*, 72 App. Div. (N. Y.) 23, 76 N. Y. Supp. 157.

ment for defendant, notwithstanding a general verdict for plaintiff.<sup>75</sup> Where plaintiff was driving slowly on a street which crossed defendant's tracks, and, as he got within eight or ten feet of the first track, saw a car coming rapidly, about two hundred feet away, and just as his horses reached the second track noticed that the car was approaching very fast on that track, and whipped his horse, to get across the track, but the hind wheels of the carriage were struck, and the plaintiff injured, it was held not sufficient to show that the plaintiff was guilty of contributory negligence, as a matter of law.<sup>76</sup> A boy driving a delivery wagon was held not guilty of contributory negligence, as a matter of law, in backing up at right angles to the curb to deliver heavy goods at a store, though in doing so his horses necessarily stood across defendant's street car tracks, where, owing to obstructions in the street, he could not have placed his horses and wagon longitudinally opposite such store, and it was not shown that he saw any car approaching when he placed his wagon against the curb, nor that he had reason to apprehend the approach of one before he could deliver his goods.<sup>77</sup> It is not, as a matter of law, negligence for one to continue to descend with a heavy load a steep grade crossing at a street railway, without fixing a lock chain to the wagon which breaks after the descent is begun.<sup>78</sup> One is not, as a matter of law, guilty of contributory negligence in driving at a walk over street railway tracks at a crossing in front of an approaching car far enough away to enable the wagon to pass safely if the car had been properly managed.<sup>79</sup>

**§ 416. Contributory negligence in driving upon or across tracks without looking or listening.**— There seems to be no universal rule as to the liability for contributory negligence, as a matter of

**75.** *McCoy v. Kokomo Ry. & L. Co.*, 158 Ind. 658, 64 N. E. 92.

**76.** *Mewbray v. Brooklyn H. R. Co.*, 59 App. Div. (N. Y.) 239, 69 N. Y. Supp. 435.

**77.** *Fenner v. Wilkesbarre, etc.*, Co., 202 Pa. St. 365, 51 Atl. 1034.

**78.** *Cross v. California St. Cable R. Co.*, 102 Cal. 313, 36 Pac. 673.

**79.** *Zimmerman v. Union R. Co.*, 3 App. Div. (N. Y.) 219, 38 N. Y. Supp. 362.

law, in persons driving upon or across the tracks of a street railroad company, without looking or listening for approaching cars. In Pennsylvania and some other jurisdictions the courts apply the rule in all cases, whether at street car crossings or elsewhere, that a failure to look and listen, and, under some circumstances, to stop, is negligence *per se*, which will bar a recovery for injuries sustained by a collision with a car.<sup>80</sup> In New Jersey and some

**80.** *Boehmer v. Pittsburgh, A. & M. Tract. Co.*, 194 Pa. St. 313, 45 Atl. 126; *Thomas v. Citizens' Pass. R. Co.*, 132 Pa. St. 504, 20 Pittsb. L. J. N. S. 437, 25 W. N. C. 399, 19 Atl. 286; *Carson v. Federal St.*, etc., R. Co., 147 Pa. St. 219, 15 L. R. A. 257, 29 W. N. C. 402, 22 Pittsb. L. J. N. S. 345, 23 Atl. 369, 50 Am. & Eng. R. Cas. 462, 11 Ry. & Corp. L. J. 155; *Kern v. Second Ave. Tract. Co.*, 194 Pa. St. 75, 45 Atl. 125; *Trout v. Altoona, etc.*, R. Co., 13 Pa. Super. Ct. 17; *Wheeler v. Phila. Tract. Co.*, 150 Pa. St. 187, 30 W. N. C. 375, 24 Atl. 688, one who in driving across the track of a cable street railroad in a wagon having a hood confining his view fails to lean forward to look along the track, when by so doing he would have a clear view, while he can otherwise see but twenty-five or thirty feet on each side, is guilty of negligence *per se*, which will defeat recovery for injury from being struck by the car; *Omslaer v. Pittsburgh & B. Trac. Co.*, 168 Pa. St. 519, 26 Pittsb. L. J. N. S. 15, 32 Atl. 50, one is guilty of contributory negligence in attempting to cross an electric street railway without stopping, where his view of the track is obscured by obstructions for which the company is not responsible, and his hearing is obstructed by a wagon loaded with iron in front of him; *Morrow v. Delaware, etc.*, R.

*Co.*, 199 Pa. St. 156, 48 Atl. 974, one driving a team loaded with lumber projecting beyond the sides of the wagon is prevented by contributory negligence from recovering for injury from collision with a trolley car coming from the direction in which he was going, he not having seen the car, and, though there was plenty of space for safety, having allowed his horse to wander toward the track, thus bringing the load in collision with the car; *McPhillips v. Union Tract. Co.*, 19 Pa. Super. Ct. 223, the plaintiff cannot recover where he drove deliberately out of a driveway, in the middle of a block, into a street on which there were the two tracks of the defendant company, looked and saw an approaching car about three-quarters of a block distant, when the front wheels of his wagon were at the curb, some ten feet from the nearest track, and then turned slowly to the west, and, instead of keeping clear of the track, swung over the first rail, whereupon his horse was almost instantly struck and plaintiff himself injured; *Pieper v. Union Tract. Co.*, 202 Pa. St. 100, 51 Atl. 739, where the driver of a covered wagon, approaching street car tracks on a cross street, merely glances down the track for a distance of fifty to seventy-five feet on first reaching the street where the tracks are located, and then drives across

other States, however, the principle is held to be well established that it is not negligence in law for a person driving a vehicle, in approaching a street crossing over which he intends to cross, to

he tracks, without again looking for approaching cars, his negligence precludes recovery for injuries received in a collision with a car; *Keenan v. Union Tract. Co.*, 202 Pa. St. 107, 51 Atl. 742, the fact that an electric railroad is in the country, and that cars are not so frequent, and obstructions to travel are not so great, as in a city, does not relieve a person about to cross the track from the duty of continuing to look for approaching cars until he reaches the track.

**In an action against a street railroad company** to recover damages for injuries to horses, a judgment for the defendant *non obstante veredicto* is properly entered where it appears from the plaintiff's own testimony that at the time of the accident he was driving a team of horses, and approached a street on which a single track was laid, which was used for travel in both directions and at a steep grade; that when at a distance of twenty to thirty feet from the track he looked up and down, and saw no car in either direction; that he proceeded looking down, and not up, the track, until the front feet of his horses were across the first rail, when he heard a whistle, looked up the grade, and saw a car approaching; that he attempted to swing his horses to the left, whereupon the off horse was struck and killed and the other horse seriously injured. *Potter v. Scranton Ry. Co.*, 19 Pa. Super. Ct. 444. See also *Moser v. Union Tract. Co.*, 1 St. Ry. Rep. 705, 205 Pa. 481, 55 Atl. 15;

*State v. United Rys. & Elec. Co.*, 97 Md. 73, 54 Atl. 612, 1 St. Ry. Rep. 260, and notes.

**One who attempts to drive across a street railway track** without looking for an approaching car, although he had some time before seen a car approaching him, is guilty of such contributory negligence as will preclude recovery, unless those in charge of the car could have avoided the injury after discovering his danger or after they could have discovered it by reasonable diligence. *Kelly v. Louisville R. Co.*, 20 Ky. L. Rep. 471, 46 S. W. 688; *Hickman v. Union Depot R. Co.*, 47 Mo. App. 65; *Cowden v. Shreveport Belt Ry. Co.*, 106 La. 236, 30 So. 747. One who attempts to cross a street on which is an electric railway track, without listening or looking for a car which he expects or knows to be rapidly approaching, is negligent *per se*. *Hickey v. St. Paul City R. Co.*, 60 Minn. 119, 61 N. W. 893, 5 Am. Electl. Cas. 494. A traveler in a vehicle, undertaking to cross a street railway track, must look in both directions from which cars may approach and make a vigorous use of his senses of sight and hearing. *Honick v. Met. St. R. Co.*, (Kan.) 71 Pac. 265. One who attempts to drive across an electric street railway track without looking, except at a point some distance from the track at which an approaching car could not be seen, is guilty of contributory negligence. *Snider v. New Orleans, etc., R. Co.*, 48 La. Ann. 1, 18 So. 695.

**One who drives a vehicle**

fail to look and listen for an approaching street car, in order to avoid danger from it.<sup>81</sup> But, while it is held, as in New York,

**across a street** railroad track in the suburbs and thinly-settled district of a city without first looking is guilty of contributory negligence. *Wosika v. St. Paul City R. Co.*, 80 Minn. 364, 83 N. W. 386. Where, in an action for injuries received by plaintiff while crossing defendant's tracks in a wagon driven by another caused by a collision of one of defendant's cars with the wagon, it was found by the jury that neither plaintiff nor the driver looked for a car before they started to cross the tracks, a judgment for plaintiff was erroneous, though the jury found that the defendant was negligent. *Dummer v. Milwaukee Elec., etc., R. Co.*, 108 Wis. 589, 84 N. W. 853.

**Where plaintiff, in the day time**, drove across the tracks of a street railway, on which he knew electric cars were running, without looking to see whether a car was coming or not, and knew nothing of its approach until it hit the hind wheels of his wagon, or until it was a rail off, it was proper, in an action for injuries, to rule that plaintiff was not in the exercise of due care and take the case from the jury. *Hurley v. West End St. R. Co.*, 180 Mass. 370, 62 N. E. 263.

**Where one attempted to cross a street railway track** without looking behind to see if a car was approaching, although it was approaching at an excessive rate of speed and no signals were given, he was guilty of contributory negligence. *Danger v. London St. R. Co.*, 30 Ont. Rep. 493; *Follet v. Toronto Ry. Co.*, 15 Ont. App. 346. But see *Toronto*

*R. Co. v. Goswell*, 24 Can. S. C. 582, driver of cart struck by a street car while crossing track is not guilty of contributory negligence, because he does not look to see if a car is approaching, if in fact it is far enough away to enable him to cross in case it is proceeding moderately and prudently.

**81.** *Dennis v. North Jersey St. Ry. Co.*, 64 N. J. L. 439, 45 Atl. 807; *McHugh v. North Jersey St. Ry. Co.*, (N. J.) 46 Atl. 782; *Consol. Tract. Co. v. Scott*, 58 N. J. L. 682, 34 Atl. 1094; *Consol. Tract. Co. v. Haight*, 59 N. J. L. 577, 37 Atl. 135; *Consol. Tract. Co. v. Glynn*, 59 N. J. L. 433, 37 Atl. 66; *Consol. Tract. Co. v. Lambertson*, 59 N. J. L. 297, 36 Atl. 100; *Railway Co. v. Miller*, 59 N. J. L. 423, 36 Atl. 885, 39 Atl. 645; *Consol. Tract. Co. v. Chenoweth*, 58 N. J. L. 416, 34 Atl. 817; *affd.*, 61 N. J. L. 554, 35 Atl. 1067; *West Chicago St. Ry. Co. v. Huhnke*, 82 Ill. App. 404, 18 Nat. Corp. Rep. 454, 4 Chic. L. J. Wkly. 218; *Citizens' Rapid T. Co. v. Seigrist*, 96 Tenn. 119, 33 S. W. 920, it is not negligence for one driving four miles an hour to attempt to drive across a street railroad track on observing when ten yards from the track a street car approaching 200 to 250 yards away, without looking a second time for a car; *Citizens' St. R. Co. v. Albright*, 14 Ind. App. 433, 42 N. E. 238, rehearing denied, 14 Ind. App. 438, 42 N. E. 1028, failure to listen before attempting to cross a street railway track is not, as matter of law, such contributory negligence as will preclude recovery, unless such failure materially contributed to the

that a person is not necessarily negligent in failing to look and listen for approaching street cars before attempting to drive across the track of a street railroad, it is held there and elsewhere that the traveler, as well as those operating the car, is bound to use that degree of care which ordinarily prudent men would use under the circumstances, and that, when the situation and surrounding circumstances are such that a person of ordinary prudence would have looked and listened, failure to do so constitutes negligence as a matter of fact.<sup>82</sup> It has also been quite generally held that one

accident; *Lewis v. Cinn. St. Ry. Co.*, 10 Ohio S. & C. P. Dec. 53, there is no absolute rule requiring one driving along a street upon which are the double tracks of a street railroad, to either stop, look, or listen before crossing such tracks, or to look back one or more times before going on the tracks, to ascertain whether or not there is a car operated by electricity coming from behind, in such a manner as to probably or inevitably bring about an accident; *Beerman v. Union R. Co.*, (R. I.) 52 Atl. 1090, the rule requiring a man driving a vehicle to look before crossing a steam railroad is equally applicable to an electric railway. *Memphis St. Ry. Co. v. Riddiek*, 1 St. Ry. Rep. 769, 110 Tenn. 227, 75 S. W. 924.

**82.** *Walsh v. Fonda, Johnstown & G. R. R. Co.*, 114 App. Div. (N. Y.) 272, 5 St. Ry. Rep. 774, 99 N. Y. Supp. 777; *Read v. Brooklyn Heights R. Co.*, 32 App. Div. (N. Y.) 503, 53 N. Y. Supp. 209; *Pyne v. Broadway, etc., R. Co.*, 19 N. Y. Supp. 217; *Moebus v. Herrman*, 108 N. Y. 349, 15 N. E. 415; *Ward v. Rochester Elec. Ry. Co.*, 17 N. Y. Supp. 427; *Bossert v. Nassau Elec. R. Co.*, 40 App. Div. (N. Y.) 144, 57 N. Y. Supp. 896, while it is not negligence, as a matter of law, for one driving

a wagon at night, in the track of a surface railroad, to fail to look backward to see an approaching car, yet he may not rely wholly upon the supposition that the railroad's servants will see him in time to give warning, but must be on the alert to discover in some manner, and by some exercise of his senses, the approach of a car from the rear; *Devine v. Brooklyn H. R. Co.*, 34 App. Div. (N. Y.) 248, 54 N. Y. Supp. 626; *Johnson v. Brooklyn H. R. Co.*, 34 App. Div. (N. Y.) 271, 54 N. Y. Supp. 547, where driver was not looking back for the approach of a car from behind him, it was held that it was error to charge that plaintiff had a right to assume that the motorman would give him timely warning of his approach, though the court also charged that he had no right to assume that the car would stop before it reached him; *Bryant v. Metropolitan St. R. Co.*, 28 Misc. Rep. (N. Y.) 532, 59 N. Y. Supp. 595, a driver of a wagon who turns unnecessarily upon a cable railroad track, without looking at any time for an approaching car, and who trusts entirely to the vigilance of the motorman, does not show freedom from contributory negligence, upon his wagon's being hit by the car as he is leaving the

who drives upon a street car track in front of an approaching trolley car, without looking or listening, and is injured by an ensuing collision, is guilty of such contributory negligence as will bar

track; *Hill v. Met. St. Ry. Co.*, 30 Misc. Rep. (N. Y.) 440, 62 N. Y. Supp. 596, plaintiff driving along defendant's street railroad track at night, was overtaken by a car which struck his wagon, and it appeared that he had driven along the track for 300 feet without looking back, held, that a judgment in his favor against the railroad company for the damage done by the collision should be reversed; *Pecheskey v. Met. St. Ry. Co.*, 30 Misc. Rep. (N. Y.) 432, 62 N. Y. Supp. 478; *Vonelling v. Met. St. Ry. Co.*, 35 Misc. Rep. (N. Y.) 301, 71 N. Y. Supp. 751, the driver of a wagon, failing to look in both directions for an approaching cable car, before crossing its track from an intersecting street, is chargeable with contributory negligence; *Wiedman v. Erie R. Co.*, 66 App. Div. (N. Y.) 347, 72 N. Y. Supp. 683, a person driving a horse across a railroad track at a highway crossing is not to be charged with all the possibilities of vision and hearing as he approached the track, but is bound simply to make all reasonable effort to see and hear that a careful and prudent man would make under the circumstances; *Schmidt v. Interurban St. Ry. Co.*, 81 N. Y. Supp. 832, where plaintiff drove on a street railway track to cross it at a curve as it entered another street, without looking to the rear to ascertain whether a car was approaching, and his wagon was struck by a car coming directly behind him on the curve, from which plaintiff was injured, he was guilty of contributory negligence; *Schilling v.*

*Met. St. Ry. Co.*, 47 App. Div. (N. Y.) 500, 62 N. Y. Supp. 403; *Noll v. St. Louis Transit Co.*, 100 Mo. App. 367, 73 S. W. 907, the driver of a team which was struck by a street car from behind is not necessarily guilty of contributory negligence in driving along the car track, without looking back, where no warning was given, as should have been, if he was, or, by the use of ordinary care, could have been seen, or if it was too dark to see him; *State v. United Rys. & Elec. Co.*, 97 Md. 73, 54 Atl. 612, though an electric railway is negligent in running a car at a higher rate of speed than allowable, and in failing to give signals, its negligence does not excuse that of one who, seeing a car approaching, drives across the track without looking again, relying on his own estimate that he can make the crossing in safety; *Cincinnati St. R. Co. v. Whitecomb*, (C. C. App., 6th C.) 66 Fed. 915, 1 Ohio Dec. Fed. 5, persons driving across street railway tracks in a city are not obliged, as a matter of law, to stop, look, and listen before crossing, unless there are some circumstances which would make it ordinarily prudent; *Stanley v. Cedar Rapids, etc., R. Co.*, 119 Iowa 526, 93 N. W. 489, ordinary care to discover an approaching street car by looking and listening is all that is required of a driver; *Reynolds v. Third Ave. R. Co.*, 8 Misc. Rep. (N. Y.) 313, 59 St. Rep. (N. Y.) 276, 28 N. Y. Supp. 734, one who attempts to cross a track when a trolley car is only twenty-five feet distant without looking, is guilty of negligence, al-

recovery, when, if he had looked and listened, he might or must have known of the dangerous proximity of the car.<sup>83</sup> But a driver

though the accident could have been avoided by the exercise of greater care on the part of the company's servants; *McKelvey v. Twenty-third St. R. Co.*, 5 Misc. Rep. (N. Y.) 424, 26 N. Y. Supp. 711; *Winter v. Cross-town St. R. Co.*, 8 Misc. Rep. (N. Y.) 362, 59 St. Rep. (N. Y.) 598, 28 N. Y. Supp. 695; *Davidson v. Denver Tramway Co.*, 4 Colo. App. 283, 35 Pac. 920, one who, fully acquainted with the locality, drives along an electric railway track for some distance, and, although he sees a car ahead of him waiting on a turnout for another car coming in the opposite direction, turns across the track in the middle of the block without looking or listening for the car approaching from behind, and is struck by it and injured, is guilty of such contributory negligence as will prevent a recovery against the railway company. See also *Chicago City Ry. Co. v. Fennimore*, 199 Ill. 9, 64 N. E. 985; affg. 99 Ill. App. 174; *Chicago City Ry. Co. v. Sandusky*, 198 Ill. 400, 64 N. E. 990; affg. 99 Ill. App. 164; *Howard v. Indianapolis St. Ry. Co.*, 29 Ind. App. 514, 64 N. E. 890; *Potter v. Leviton*, 199 Ill. 93, 64 N. E. 1029; affg. 101 Ill. App. 544; *Campbell v. St. Louis & Suburban Ry. Co.*, 1 St. Ry. Rep. (Mo.) 475, 75 S. W. 86.

The duty of the motorman to watch extends over the whole line. *Annis-ton Elec. & Gas Co. v. Elwell*, (Ala.) 5 St. Ry. Rep. 20, 42 So. 45.

83. *Birmingham Ry., L. & P Co. v. McLain*, (Ala.) 6 St. Ry. Rep. 470, 50 So. 149; *Daniels v. Bay City Tract. & Elec. Co.*, 143

*Mich.* 493, 5 St. Ry. Rep. 510, 107 N. W. 94; *Cawley v. La Crosse City R. Co.*, 101 Wis. 145, 12 Am. & Eng. R. Cas. N. S. 453, 77 N. W. 179; *Young v. Citizens' St. R. Co.*, 148 Ind. 54, 44 N. E. 927; *Everet v. Los Angeles Con. Elec. Co.*, 115 Cal. 105, 34 L. R. A. 350, 43 Pac. 207, 46 Pac. 889; *Hall v. West End St. R. Co.*, 168 Mass. 461, 47 N. E. 124; *Flanagan v. People's Pass. R. Co.*, 163 Pa. St. 102, 29 Atl. 743; *Henderson v. Detroit City St. R. Co.*, 116 Mich. 368, 74 N. W. 525; *Blaney v. Electric Traction Co.*, 184 Pa. St. 524, 39 Atl. 294; *McQuade v. Met. St. Ry. Co.*, 17 Misc. Rep. (N. Y.) 154, 39 N. Y. Supp. 335; *Kane v. People's Pass. R. Co.*, 181 Pa. St. 53, 37 Atl. 110; *Burke v. New York Cent., etc., R. Co.*, 73 Hun (N. Y.) 32, 25 N. Y. Supp. 1009; *Cones v. Cincinnati, etc., R. Co.*, 114 Ind. 328; *Dieck v. New Orleans, etc., R. Co.*, 51 La. Ann. 262, 25 So. 71, one who drove upon an electric car track without looking or listening for an approaching car, or if he had looked and listened must have seen and heard a car rapidly approaching a half block away, was guilty of contributory negligence; *Borschall v. Detroit Ry. Co.*, 115 Mich. 473, 4 Detroit Leg. N. 938, 73 N. W. 551, so held when motorman did all in his power to stop the car after he saw that the driver was about to go upon the track; *Mercier v. New Orleans, etc., R. Co.*, 31 La. Ann. 490; *Helber v. Spokane St. R. Co.*, 22 Wash. 319, 61 Pac. 40; *Smith v. Citizens' R. Co.*, 52 Mo. App. 36. a person who was struck while attempting to drive across a cable car

or one riding with him is not bound under all circumstances to take the same precautions before driving upon street railway tracks as is required of a pedestrian.<sup>84</sup> If the driver of a vehicle does not know of the existence of street railway tracks upon the street which he is about to cross, and there is nothing in the

track cannot recover for his injuries, if his view was not obstructed and there was nothing to prevent seeing the car in time to avoid injury, although the gripman failed to give the signal but did what he could to avert the injury after seeing the danger; *Schausten v. Toledo Consol. St. R. Co.*, 7 Ohio Dec. 389, one who at night drives on an electric street railway track for the purpose of crossing it, without looking to see if a car is approaching, is guilty of contributory negligence, when the car is lighted and there would be no difficulty in seeing it several hundred feet away; *Culbertson v. Met. St. R. Co.*, 140 Mo. 35, 36 S. W. 834, an adult laboring under disability 'has no right to drive over a cable car track, without looking or listening for trains, in reliance upon a signal of the flagman stationed at the crossing; *South Covington, etc., R. Co. v. Enslen*, 18 Ky. L. Rep. 921, 38 S. W. 850, one who after seeing an electric car approaching rapidly in his rear, drives nearly 100 feet on one side of the track to a street crossing, and then attempts to cross the track without looking for a car, is guilty of such contributory negligence as will preclude recovery for injuries caused by collision with a car, although no signal for crossing was given; *Highland Ave. & B. R. Co. v. Sampson*, 112 Ala. 425, 20 So. 566, a driver acquainted with the tracks and the operations of trains on a street railway line where the

injuries occurred, who approached the track from a cross street at a fast walk or trot without pausing and listening for approaching trains, is guilty of contributory negligence precluding recovery for the killing of his mule and destruction of a wagon and harness, by being struck by a train which he could have seen in time to avoid accident if he had looked; *Merritt v. Foote*, 128 Mich. 367, 87 N. W. 262, 8 Detroit Leg. N. 678; *Hilts v. Foote*, 125 Mich. 241, 84 N. W. 139, 7 Detroit Leg. N. 489, failure to look held contributory negligence under the circumstances of the case; *McClellan v. Chippewa Val. Elec. Ry. Co.*, 110 Wis. 326, 85 N. W. 1018; *Fairbanks v. Bangor, etc., Ry. Co.*, 95 Me. 78, 49 Atl. 421; *Warren v. Bangor, etc., Ry. Co.*, 95 Me. 115, 49 Atl. 609, there is no absolute rule of law that a person riding along a street must look and listen for an approaching car before entering upon the track of an electric railroad, and hence whether his failure to look and listen amounts to negligence must be determined from all the facts and circumstances proven; under the circumstances of the cases cited plaintiffs were held guilty of contributory negligence for failure to look and listen; *Met. St. Ry. Co. v. Agnew*, 65 Kan. 478, 70 Pac. 345.

**84.** *Consol. Traction Co. v. Behr*, 59 N. J. L. (30 Vroom) 477, 37 Atl. 142.

physical conditions to impute to him such knowledge, no warning signal being sounded, the law does not impose an absolute duty upon him to look and listen for an approaching car before attempting to make the crossing, and for failure to do so he is not chargeable with contributory negligence as a matter of law. The driver of a vehicle upon the streets of a city has a right to rely upon the law which requires the street railway company to give timely warnings of the approach of a car.<sup>85</sup> The driver of a wagon on a street car track at night, going in the direction of an approaching car, may rely on the sound of the gong to give him warning of the approach of the car, and his failure to look back is not such contributory negligence as to preclude the right to recover for damages occasioned by collision with his wagon.<sup>86</sup> Where plaintiff was driving with a horse and wagon toward defendant street railway company's tracks, and when about eighty feet from them looked in both directions for a car, but saw none; from this point he had a clear view of the track for 300 to 350 feet, but after leaving it and nearing the track his view was obstructed by trees, so that he could not see an approaching car until his horse was actually on the track and the vehicle within two to four feet of it, in which position his horse was struck by a car and he was injured, it was held that plaintiff was not negligent, as a matter of law, in driving over the space where his view was obscured at the rate of four to five miles an hour, or in not getting down from his wagon and going forward in advance of his horse, to see if a car was coming, before driving onto the track.<sup>87</sup> It is not negligence to drive a covered wagon in a public street containing street railway tracks, though the rear of the wagon is so closed with boxes and drawers that the driver cannot see out behind through the interior; and one driving along a street railway track in a covered wagon so closed at the rear does his duty of he gets off the track when he knows of the approach of a car, and he is not bound to keep an

**85.** *Denver City Tramway Co. v. Louis & M. R. R. Co.*, 89 Mo. App. Martin, 44 Colo. 324, 6 St. Ry. Rep. 391.

605, 98 Pac. 836.

**87.** *Kelly v. Wakefield & S. St. Ry. Co.*, 179 Mass. 542, 61 N. E. 139.

impossible watch on the rear.<sup>88</sup> So, though a traveler driving upon or in close proximity to the tracks of a street railway is bound to look ahead to see whether a car is liable to come into collision with him, it cannot be said, as a matter of law, that he is bound to be constantly looking backward for that purpose, so as to be free from negligence.<sup>89</sup> Where plaintiff was driving a wagon on a street car track commonly used by teamsters, on a dark night, and a companion sitting in the wagon and looking backward told him of a car approaching from the rear, and he immediately commenced to turn out, and was struck and injured before he got off the track by the car, which was going at a high rate of speed, it was held not sufficient, as a matter of law, to show that plaintiff was guilty of contributory negligence.<sup>90</sup> Where plaintiff's intestate and a relative were driving parallel with an electric street railway track, in the beaten track between it and a ditch, after dark, the relative driving at a walk, and, as he testified, both expected a car to approach and kept looking around; the last time intestate looked he discovered the car close upon them, whereupon the relative turned out as soon as possible, but too late, because of the rate of speed at which the car was running, to avoid a collision in which intestate received injuries from which he died, it was held not to conclusively show contributory negligence.<sup>91</sup> Where, after a street car passed plaintiff driving a wagon, she turned to cross the street behind the car, and it stopped and reversed its motion and struck the wagon, knocked plaintiff from the wagon and injured her, no negligence was attributable to her in not looking to see if the car was backing, nor in failing to hear and understand signals between the conductor and the motorman relative to backing the car.<sup>92</sup> A street railroad company being invested with the right of way over other vehicles

**88.** *Vincent v. Norton & T. St. Ry. Co.*, 180 Mass. 104, 61 N. E. 882.

**89.** *Tunison v. Weadock*, 130 Mich. 141, 8 Detroit Leg. N. 1183, 89 N. W. 703.

**90.** *United Rys. & Elec. Co. of Baltimore v. Seymour*, 92 Md. 425, 48 Atl. 850.

**91.** *Rouse v. Detroit Elec. Ry.*, 128 Mich. 149, 8 Detroit Leg. N. 577, 87 N. W. 68.

**92.** *Central Ry. Co. v. Knowles*, 93 Ill. App. 581; *affd.*, 191 Ill. 241, 60 N. E. 829.

over the portion of street occupied by its tracks, the drivers of such vehicles must turn out and allow its cars to pass, and use care not to obstruct them, and if a driver, while neglecting such duty, and failing thereby to use ordinary care for his own safety, is injured, he cannot recover of the company.<sup>93</sup> Where plaintiff was driving a wagon parallel with the street car of defendant company, running at a lawful rate of speed, and suddenly, without warning or precaution, turned across the track at an intersecting street, with the car about fifteen feet away, and was injured, he was guilty of contributory negligence, barring recovery.<sup>94</sup> A gratuitous passenger riding in the vehicle of another must use due care to avoid being injured by a collision with a street car, even though not chargeable with the driver's negligence.<sup>95</sup> Where a driver negligently drove on the track of a rapidly approaching electric car, the accident may properly be attributed to his negligence, though the vehicle was carried some distance along the track before it was overturned and the injuries inflicted.<sup>96</sup> The driver of a carriage cannot set up as an excuse for contributory negligence in failing to stop and look for an electric car after reaching a place from which he could see the track and before driving upon it, that such place was a foot crossing and that he had no right to obstruct the same.<sup>97</sup> No recovery can be had against a street railroad company for injuries caused by collision of a cable car with a carriage in which the injured person was driving, when both she and the gripman of the car slackened up before reaching the crossing, and afterward both attempted to cross, supposing that the other had stopped, and the person injured might have seen by looking that the gripman had started his car.<sup>98</sup> And a failure to look and listen for an approaching

**93.** *North Chicago Elec. Ry. Co. v. Peuser*, 190 Ill. 67, 60 N. E. 78.

**94.** *Cincinnati St. Ry. Co. v. Jenkins*, 20 Ohio C. C. 256, 11 Ohio C. D. 130.

**95.** *Farley v. Wilmington, etc., R. Co.*, 3 Pa. St. 581, 52 Atl. 543.

**96.** *Rider v. Syracuse Rapid Tran-*

*sit Ry. Co.*, 171 N. Y. 139, 63 N. E. 836.

**97.** *Manayunk, etc., Co. v. Union Traction Co.*, 7 Pa. Super. Ct. 104, 42 W. N. C. 45.

**98.** *West Chicago St. R. Co. v. Boeker*, 70 Ill. App. 67.

car, although familiar with the locality and knowing of the existence of the street car track, is not negligence on the part of a lady seventy-five years of age when riding in a funeral procession in a vehicle owned and driven by another, without reason to believe that the driver was not exercising proper care.<sup>99</sup>

**§ 417. Contributory negligence in driving vehicles on or along tracks.** — The rules as to rights of way applicable to steam railroads and travelers in the highways are not applicable to street railways and wagons traveling along the streets of a city, and a driver has the right in crossing such a railway to rely upon the exercise of ordinary care by the gripman of a car to avoid a collision.<sup>1</sup> One traveling with a horse and vehicle on a street traversed by electric trolley cars has the right to use the tracks upon which such cars are propelled whenever the necessary or customary use of the street requires or permits him to do so, and it is not contributory negligence *per se* for him to turn from one track into and upon the other track, in a street having double tracks, to allow a car to pass, if in so doing, or in endeavoring to turn back again, he is struck by a car running upon the other track.<sup>2</sup> Nor is he guilty of negligence in failing to get off the

**99.** Johnson v. St. Paul City R. Co., 67 Minn. 260, 36 L. R. A. 586, 69 N. W. 900.

**1.** Smith v. Met. St. Ry. Co., 7 App. Div. (N. Y.) 253, 74 St. Rep. (N. Y.) 706, 40 N. Y. Supp. 148.

**2.** State Consol. Traction Co. v. Reeves, 58 N. J. L. (29 Vroom) 573, 34 Atl. 128; Arnesen v. Brooklyn City R. Co., 9 Misc. Rep. (N. Y.) 270, 61 St. Rep. (N. Y.) 324, 29 N. Y. Supp. 748; Schron v. Staten Island Elec. R. Co., 16 App. Div. (N. Y.) 111, 45 N. Y. Supp. 124; McGrane v. Flushing, etc., R. Co., 13 App. Div. (N. Y.) 177, 43 N. Y. Supp. 385; Fishback v. Steinway R. Co., 11 App. Div. (N. Y.) 152, 42 N. Y. Supp. 883; Lenkner v. Citizens' Traction Co., 179 Pa.

St. 486, 36 Atl. 228, 28 Pittsb. L. J. N. S. 11; Smith v. Phila. Traction Co., 3 Pa. Super. Ct. 129, 40 W. N. C. 501; Schlitz v. Nassau Elec. R. Co., 60 N. Y. Supp. 822, 44 App. Div. (N. Y.) 542, a driver of a heavy drag, loaded with people, and to which six horses were attached, was driving on a street car track at night, and, to permit a car to pass from behind, turned to the left across a parallel track, and was immediately struck by a car approaching on the second track in the opposite direction, the driver knowing that cars were running a minute apart, and the dirt road to the right being muddy but not impassible, it was held that his turning to the left was negligence

track when a car comes along, when he tries his best to do so, and would have done so but for the reason that the rails were wet and slippery and the ice and snow thereon held his wheel, nor in turning toward the other track, instead of attempting to turn out on the side away from it, where he had no reason to anticipate that he would be unable to drive off the track at any time, and get out of the way of the car.<sup>3</sup> Street railway companies have no such proprietary interest in the portion of the street upon which their tracks are laid as limits the rights of the general public to use the same territory as a part of the public highway, so as to impose upon travelers the duty of keeping themselves and horses out of the way of the cars on such tracks.<sup>4</sup> A driver of a vehicle is guilty of contributory negligence in suddenly, and without warning, turning his horse across a street

contributing to the injury; *Cannon v. Pittsburg & B. Traction Co.*, 194 Pa. St. 159, 44 Atl. 1089, a driver on a narrow street, only twenty feet wide from curb to curb, on which there were two tracks of an electric street railway, who was overtaken by a car going in the same direction that he was driving, turned onto the other, driving along it up a hill; when the car approaching him from behind was beside his wagon, another car came suddenly into view from the other side of the hill, in front of him on the track on which he was driving, and ran into him, it was held that the driver was not guilty of contributory negligence as a matter of law in not stopping and waiting for the first car to pass him, and then returning to the track which he had left.

**A mistake of judgment** in driving off a street car track in a wrong direction, in an effort to avoid collision with an approaching car, will not necessarily preclude recovery for injuries received in the collision which

follows. *Kane v. Worcester Consol. St. Ry.*, 182 Mass. 201, 65 N. E. 54.

**3.** *Will v. West Side R. Co.*, 84 Wis. 42, 54 N. W. 30; *Laethem v. Ft. Wayne & B. I. R. Co.*, 100 Mich. 297, 58 N. W. 996; *Laufer v. Bridgeport Traction Co.*, 68 Conn. 475; *Davidson v. Schuylkill Traction Co.*, 4 Pa. Super. Ct. 86; *Blate v. Third Ave. R. Co.*, 44 App. Div. (N. Y.) 163, 60 N. Y. Supp. 732, one is not, as a matter of law, guilty of contributory negligence, where there is evidence that at the time he started to cross the street with a horse and wagon he had reason to believe that he would be able to do so without colliding with an approaching car; that, on seeing the car, he increased his speed considerably; that, though he was in full sight, the speed of the car was not slackened, and that then only the tailboard of his wagon was struck. *Bush v. St. Josephs, etc., R. Co.*, 113 Mich. 513, 71 N. W. 851, 4 Detroit Leg. N. 377.

**4.** *Omaha St. R. Co. v. Duvall*, 40 Neb. 29, 58 N. W. 531; *Cline v. Cres-*

railway track, directly in front of an approaching car.<sup>5</sup> One who, with knowledge that an electric car is approaching, drives upon the track without stopping to observe its whereabouts and is injured by it, is guilty of such contributory negligence as will bar recovery.<sup>6</sup> But where a person in a vehicle in order to avoid a sudden danger which confronts him drives upon a street car

cent City R. Co., 43 La. Ann. 327, 9 So. 122.

5. *Hannon v. North Jersey St. Ry. Co.*, 65 N. J. L. 547, 47 Atl. 803; *Mason v. Met. St. Ry. Co.*, 61 N. Y. Supp. 789, 30 Misc. Rep. (N. Y.) 108, where the driver of a loaded covered truck cut in on a street car track, forty-five to fifty feet in front of an advancing car, coming at full speed, he could not recover for injuries caused by a collision, it not appearing that the motorman was apprised of his intention to cross, or that the car could have been stopped within that distance; *Reilly v. Met. St. Ry. Co.*, 61 N. Y. Supp. 785, 30 Misc. Rep. (N. Y.) 110, where plaintiff, who was driving toward a crossing at the rate of seven to eight miles an hour, saw a car approaching about 150 to 200 feet away, and drove on, thinking to pass before it, and did not slacken speed or look up again until his companion said, "Look out!" when he saw the car within a foot of his hind wheel, and the collision complained of followed, it was held that the complaint was properly dismissed; *Anderson v. Met. St. Ry. Co.*, 61 N. Y. Supp. 899, 30 Misc. Rep. (N. Y.) 104, where plaintiff drove slowly on the track from an intersecting street after seeing a car approaching rapidly, he was held guilty of contributory negligence; *Meyer v. Brooklyn, etc., R. Co.*, 62 N. Y. Supp. 33, 47 App. Div. (N. Y.) 286, plaintiff not

guilty of contributory negligence, as matter of law, where, slowly driving a loaded truck on a south-bound track, he turned at his destination almost directly across the north-bound track, and either the hind wheels of the truck or the projecting part of the load was struck by a north-bound street car, and, as he testified, when he turned no street car was in sight, and his witnesses placed the car 75 to 200 feet distant when he reached the north-bound track; *Reed v. Metropolitan St. Ry. Co.*, 58 App. Div. (N. Y.) 87, 68 N. Y. Supp. 539, where the uncontradicted testimony is that the street car which ran into plaintiff's team was running at such speed that it could not be stopped in less than twelve feet, an instruction that plaintiff's driver was not negligent in turning across the tracks from ten to fifteen feet from the intersection of the side street, going at a slow trot, with the car in plain sight, from ten to 150 feet away, is error, as declaring that he was not negligent, though he attempted to cross only ten feet in front of the car; *Riegelman v. Third Ave. R. Co.*, 9 Misc. Rep. (N. Y.) 51, 29 N. Y. Supp. 299, 59 St. Rep. (N. Y.) 667, but where a cable car was at a standstill forty feet away it was not negligent for plaintiff to turn his carriage upon the track in front of it for the purpose of turning around.

6. *Citizens' St. R. Co. v. Helvie*, 22

track, thereby running into another danger, such act does not of itself constitute contributory negligence as a matter of law.<sup>7</sup> And where the plaintiff was at the time of the accident driving his covered wagon heavily loaded with charcoal slowly up a narrow street with a railway track upon it, planked between the rails, and with very little space outside of the rails to the curbing of the gutter, and the horse was on the planks; the wagon itself mostly upon it, and it was rightfully occupying the track when one of defendant's cars, in charge of a motorman, moving at full speed, ran into it without warning from the rear, breaking the wagon and painfully injuring the plaintiff, and the wagon did not go upon the track just before the car reached the spot, suddenly, and too late for the motorman to stop the car, but it was partly on the track all the while, the motorman was declared to be greatly at fault and the plaintiff not in the least degree blamable.<sup>8</sup> It is contributory negligence for a person in a covered wagon to turn suddenly across a street car track, away from a crossing, without assuring himself by proper investigation that no car is coming, and one driving in a covered wagon, whose view on either side is obstructed, is guilty of such negligence in attempting to cross the track of a street railway, without looking, as to prevent recovery for injuries received by being struck by a car which repeatedly sounded its bell before the attempt to cross.<sup>9</sup> Where plaintiff was driving along defendant's tracks at night, with his cap pulled over his ears, when there was ample room to drive alongside the tracks, he was held guilty of contributory negligence.<sup>10</sup> The driver of a truck following a street car is bound to wait until the car has advanced far enough to give him an unobstructed view

Ind. 515, 53 N. E. 191; Carson v. Federal St. R. Co., 147 Pa. St. 219, 15 L. R. A. 257, 23 Atl. 369.

7. Palmer v. Larchmont Horse Ry. Co., 112 App. Div. (N. Y.) 341, 5 St. Ry. Rep. 772, 98 N. Y. Supp. 567.

8. Weiss Haus v. New Orleans Ry., L. & P. Co., 124 La. 549, 6 St. Ry. Rep. 472, 50 So. 540.

9. Fritz v. Detroit Citizens' St. R.

Co., 105 Mich. 50, 62 N. W. 1007, 2 Detroit Leg. N. 19, 5 Am. Electl. Cas. 480; Boerth v. West Side R. Co., 87 Wis. 288, 58 N. W. 376; Blakeslee v. Consol. St. R. Co., 105 Mich. 462, 63 N. W. 401, 2 Detroit Leg. N. 154.

10. Abbott v. Kansas City Elev. Ry. Co., 121 Mo. App. 582, 5 St. Ry. Rep. 675, 97 S. W. 198.

of the adjoining track, before attempting to cross such track, and he is not relieved from the imputation of contributory negligence by the fact that he looked when the car obstructed his view.<sup>11</sup> A driver cannot recover when he was driving at the time with wheels in one track of a street railway, although there was plenty of room on the outside, and his view of the approaching car was unobstructed, and the car driver supposed he would turn out, and he did all in his power to prevent the accident as soon as he discovered the danger.<sup>12</sup> A driver whose carriage was standing between the curb and a street car track, in a space so narrow as to barely admit of the passage of a car without striking the carriage, was not, as matter of law, guilty of contributory negligence, because the carriage made a slight movement, bringing it in contact with the middle of a street car which approached from the rear without warning, although the driver had seen the car approaching just before he got into the carriage, but did not know it was continuing on its way.<sup>13</sup> Where plaintiff had shown that the deceased was compelled to drive on defendant's track within a block of the place of the accident, to get around a vehicle in the roadway, and while driving thereon his wagon was struck by a car, causing injuries from which he died; that the wagon was covered with a curtain closing the rear, compelling deceased's wife to lean out to look for a car, which she did, in the presence of deceased; that these things were done in the day time, and under circumstances which would justify a reliance on the duty of defendant's servants, in the exercise of reasonable care, to see the wagon and give warning, he was held to have fully sustained the burden of proof.<sup>14</sup> But a driver was held, as matter of law, guilty of contributory negligence precluding recovery for his death from being struck by a street car, where, knowing that cars passed frequently, and that the nearest rail of the track was not more than ten

**11.** *Baumann v. Met. St. Ry. Co.*, 21 Misc. Rep. (N. Y.) 658, 47 N. Y. Supp. 1094.      **Misc. Rep. (N. Y.) 684, 47 N. Y. Supp. 1090.**

**12.** *Glazebrook v. West End St. R. Co.*, 160 Mass. 239, 35 N. E. 553.      **14.** *Seifter v. Brooklyn Heights R. Co.*, 55 App. Div. (N. Y.) 10, 66 N. Y. Supp. 1107.

**13.** *Tarler v. Met. St. Ry. Co.*, 21

inches from the hub of one of the wheels of his wagon, he attempted to dismount by stepping on the hub with his back to the track when the car was in plain sight, about fifty feet away, approaching at a fast gait.<sup>15</sup> When the questions of negligence and contributory negligence in any case are not wholly free from doubt, on the evidence, the jury, not the court, should pass upon them.<sup>16</sup>

§ 418. **Contributory negligence — Car coming from rear.** — A driver in a city street has a right to expect that street cars will be managed with reasonable care and a proper regard for the rights of others lawfully using the street, and he may drive along the track in full view of a car approaching from the rear; and the fact that he so proceeds for any distance will not charge him with contributory negligence in case of a collision, if, under all the circumstances, his conduct was consistent with ordinary prudence; the only limitation on his right being that he must not unnecessarily interfere with the passage of the car, which, though entitled to preference, has not an exclusive right to the track.<sup>17</sup>

15. *Crowley v. Met. St. Ry. Co.*, 24 App. Div. (N. Y.) 101, 48 N. Y. Supp. 863. So, the driver of a milk wagon which was left on an electric railroad track while he went down a side street to deliver milk to customers, a little before sunrise, thinking it impossible on account of a recent fall of snow to drive through the side street with his wagon, was held guilty of contributory negligence precluding recovery, as he knew that cars were constantly passing and to be expected and that his wagon was not likely to be seen, because the road at that place was covered over by the structure of an elevated railroad. *New York Condensed Milk Co. v. Nassau Elec. R. Co.*, 29 Misc. Rep. (N. Y.) 127, 60 N. Y. Supp. 234.

16. *Orange & Newark H. R. Co. v. Ward*, 47 N. J. L. 560; *Leavitt v.*

*Chicago & N. Ry. Co.*, 64 Wis. 228, 25 N. W. 4; *North Hudson R. Co. v. Isley*, 49 N. J. L. 468, 10 Atl. 665; *Mullen v. Central Park, etc., R. Co.*, 49 St. Rep. (N. Y.) 80, 1 Misc. Rep. (N. Y.) 216, 21 N. Y. Supp. 101; *Smith v. Met. St. Ry. Co.*, 7 App. Div. (N. Y.) 253, 40 N. Y. Supp. 148, 74 St. Rep. (N. Y.) 706; *Lowy v. Met. St. Ry. Co.*, 62 N. Y. Supp. 743, 30 Misc. Rep. (N. Y.) 775; *Milford & N. St. Ry. Co. v. Cline*, 150 Fed. 325, 5 St. Ry. Rep. 445.

17. *Cohen v. Metropolitan St. R. Co.*, 68 N. Y. Supp. 830, 34 Misc. Rep. (N. Y.) 186; *Scannell v. Boston El. Ry. Co.*, 176 Mass. 170, 57 N. E. 341; *West Chicago St. R. Co. v. Dougherty*, 89 Ill. App. 362; *Swain v. Fourteenth St. R. Co.*, 93 Cal. 179, 28 Pac. 829, not negligent *per se* for driver of police patrol wagon to drive along and

As to the duty imposed upon a person driving along street car tracks it seems to have been well stated in a case in Missouri that a person having used proper care in driving upon the tracks is not bound to look back to see if a car is coming from the rear. It is the duty of persons driving on the street to look ahead so as to be able to proceed with safety, so far as other users of the street are concerned, and they have the right to presume that persons in control of cars and other vehicles following them will be on the lookout for their safety and avoid running upon them from behind.<sup>18</sup> So a driver of an automobile is not guilty of contributory negligence as a matter of law by reason of driving upon street car tracks, nor by reason of the fact that while upon such tracks he does not look back from time to time; because he has a paramount duty to look ahead, and may rely for his protection at night upon the red light on the rear of his automobile.<sup>19</sup> And so the driver of a sprinkling cart, who permitted one wheel to be on a street railway track, but who frequently turned to see that no car was coming and listened for a bell, is not guilty of negligence contributing to his injury by being thrown from the cart by the collision of a car with it from behind, when the only warning of the approaching car was given 700 feet away, after which the car approached at an accelerated rate of speed, which there was no attempt to slacken until within two or three car lengths of the wagon, when by reason of defective appliances the driver

upon track; *Rascher v. East Detroit*, etc., R. Co., 90 Mich. 413, 51 N. W. 463, 4 Am. Electl. Cas. 473, 30 Am. St. Rep. 447, a driver not a trespasser or negligent; *Lynam v. Union Ry. Co.*, 114 Mass. 83; *Cook v. Met. St. Ry. Co.*, 98 Mass. 361; *Fleckenstein v. Dry Dock*, etc., R. Co., 105 N. Y. 655, 11 N. E. 951; *North Chicago St. R. Co. v. Zeiger*, 182 Ill. 9, 54 N. E. 1006; *Adolph v. Central Park*, etc., R. Co., 65 N. Y. 554; *Toledo*, etc., R. Co. v. *Gilbert*, 24 Ohio C. C. 181; *Lang v. Met. St. Ry. Co.*, 26 Misc. Rep. (N. Y.) 754, 57 N. Y.

Supp. 249, turning a horse and covered wagon about, in front of a cable car approaching rapidly, held contributory negligence.

**18.** *Mayes v. Metropolitan St. Ry. Co.*, 121 Mo. App. 614, 5 St. Ry. Rep. 683, 97 S. W. 612. See *Rechtenwald v. Metropolitan St. Ry. Co.*, (Mo.) 5 St. Ry. Rep. 681, 97 S. W. 557; *Peterson v. St. Louis Transit Co.*, 199 Mo. 331, 5 St. Ry. Rep. 684, 97 S. W. 860.

**19.** *Baldie v. Tacoma Ry. & P. Co.*, 52 Wash. 75, 6 St. Ry. Rep. 712, 100 Pac. 162.

was unable to stop the car, but neither rang the bell, nor used an effective appliance which was at hand.<sup>20</sup> The driver of a grocery wagon who, when within 100 feet of his destination, looked back but could discover no approaching car, is not, as matter of law, guilty of contributory negligence for injuries sustained in a collision with a car approaching from the rear at a point at which he had stopped to deliver goods, when it is not clear that the street was wide enough to permit the vehicle to stand between the curb and the rail and permit a car to pass.<sup>21</sup> A driver is not, as matter of law, guilty of contributory negligence in driving so close to a street railway track that a car approaching from the rear struck her wagon, where she looked in the direction from which the street car approached shortly before, and the car was not in sight, and she knew that she would be in sight of a motorman approaching from behind for more than one-half a mile, and the cars ran only each half hour, and the portion of the roadway which was macadamized and used by the public was comparatively narrow.<sup>22</sup> But it is the duty of vehicles upon street railway tracks to get off in time to allow the car, if possible, to pass without delay, and of the car to proceed at a reasonable rate of speed, and to sound a signal when coming into dangerous proximity with other vehicles. The failure of persons driving upon street railway tracks to be upon the alert and to exercise reasonable diligence to get off when the car is approaching is negligence, which will preclude recovery for injuries from a collision happening wholly or in part in consequence thereof.<sup>23</sup> Where the driver of a car-

**20.** *Abrahams v. Los Angeles Traction Co.*, 124 Cal. 411, 57 Pac. 216.

**21.** *Black v. Staten Island Elec. R. Co.*, 40 App. Div. (N. Y.) 238, 57 N. Y. Supp. 1112.

**22.** *Manor v. Bay Cities Consol. R. Co.*, 118 Mich. 1, 76 N. W. 139, 5 Detroit Leg. N. 420.

**23.** *Breary v. Traction Co.*, 5 Pa. Dist. Rep. 95; *Ulrich v. Toledo Consol. St. R. Co.*, 1 Ohio C. D. 111, 10

Ohio C. C. 635; *Adolph v. Central Park, etc., R. Co.*, 76 N. Y. 530, one who is driving upon a railroad track, and omits to turn off with seasonable diligence, is guilty of contributory negligence, if injured by a collision; *Pechesky v. Met. St. Ry. Co.*, 62 N. Y. Supp. 478, 30 Misc. Rep. (N. Y.) 432, where plaintiff saw a street car approaching about 250 feet away, and drove on the track in front of it for a considerable distance, making no

riage on a street car track knows that the car is approaching from behind, or is about to collide with his carriage, it is his duty to do all he can to avoid the collision, and it is no excuse that his back is to the approaching car.<sup>24</sup> And again it has been held that one driving upon the tracks of a street railway is not, as matter of law, free from contributory negligence for injuries sustained by being struck by a car approaching from the rear, when he was familiar with that part of the roadway and was on a line of track where all cars must approach from the rear, and was passing a down grade;<sup>25</sup> and also that one driving along a street railway track is not excused from the duty of keeping a lookout for cars approaching from behind, because he looked before entering upon the track and saw no car, and had reasonable grounds to suppose that there would be no car which would find it necessary to pass along the track where he was driving, nor is he excused because he is in a covered carriage;<sup>26</sup> and that a driver is, as matter of law, guilty of contributory negligence precluding recovery for injuries received in a collision between his wagon and a car which approached from the rear, in driving along the tracks for over one-half a block without paying any attention to the cars, and relying entirely upon the vigilance of the motor-man.<sup>27</sup>

attempt to observe its approach, and his wagon was struck by the car as he was turning off the track, he was guilty of negligence; *Hill v. Met. St. Ry. Co.*, 62 N. Y. Supp. 596, 30 Misc. Rep. (N. Y.) 440, where plaintiff, who was familiar with a city street and knew that the cars were frequently passing and repassing thereon, drove along a street railway track at night for a distance of 300 feet, without looking behind him, and was overtaken by one of defendant's cars, which struck his wagon and injured his horse and wagon, it was held that he was guilty of contributory negligence.

**24.** *McCann v. New York & Q. C.*

*R. Co.*, 56 App. Div. (N. Y.) 419, 67 N. Y. Supp. 748; *Camden, etc., R. Co. v. Preston*, 59 N. J. L. (30 Vroom) 264, 35 Atl. 1119, 6 Am. Electl. Cas. 523, a driver is not, as matter of law, guilty of contributory negligence precluding recovery for injuries sustained in a collision with a trolley car which approached from the rear, because he violated his duty to turn out of the tracks upon notice of the approach of the car.

**25.** *Johnson v. Brooklyn Heights R. Co.*, 34 App. Div. (N. Y.) 271, 54 N. Y. Supp. 547.

**26.** *Siek v. Toledo Consol. St. R. Co.*, 16 Ohio C. C. 393, 9 Ohio C. D. 51.

**27.** *Bryant v. Met. St. Ry. Co.*, 59

**§ 419. Contributory negligence of pedestrians in crossing tracks without looking or listening.** — The introduction of new forms of vehicles and of new motive power in street railways has not impaired the right of foot passengers to safe passage at street crossings, but the speed of cars must be so regulated and such warning given of their approach, at whatever cost of pains and trouble, that the footman using ordinary care may, in the absence of unavoidable accidents, cross in safety. A person about to cross the track of a street railway must exercise care proportioned to the danger to be avoided and the consequences which may result from the want of it, according to the particular circumstances surrounding him, but only such care as may be expected of persons of ordinary prudence.<sup>23</sup> At a street crossing, or at a place used as

N. Y. Supp. 595, 28 Misc. Rep. (N. Y.) 532; *Quinn v. Brooklyn City R. Co.*, 40 App. Div. (N. Y.) 608, 57 N. Y. Supp. 544; *Lefkowitz v. Met. St. Ry. Co.*, 56 N. Y. Supp. 215, 26 Misc. Rep. (N. Y.) 787.

**28.** *Cincinnati St. R. Co. v. Snell*, 54 Ohio St. 197, 35 Ohio L. J. 140, 43 N. E. 207, 32 L. R. A. 276; *Chicago City R. Co. v. Fennimore*, 78 Ill. App. 478, 3 Chic. L. J. Wkly. 520; *Burgess v. Salt Lake City R. Co.*, 17 Utah 406, 53 Pac. 1013, a person crossing a street in which there are street car tracks is bound to exercise the same degree of care as the railroad company is required to exercise; *Pousano v. St. Charles St. R. Co.*, 52 La. Ann. 245, 26 So. 820; *Walsh v. Hestonville, etc., R. Co.*, 194 Pa. St. 570, 45 Atl. 322; *Cox v. Wilmington City Ry. Co.*, 4 Penn. (Del.) 162, 53 Atl. 569; *Russell v. Minneapolis St. Ry. Co.*, 83 Minn. 304, 86 N. W. 346, in an action against a street railway company for injuries received by plaintiff while attempting to cross a street, evidence that she was unacquainted with the locality which she was in and did

not observe the railway tracks in the street, that the accident occurred in broad daylight, that she was in possession of all her faculties, and that there was nothing to obstruct her view or prevent her hearing or seeing a car, showed that she was guilty of contributory negligence and could not recover; *Buckley v. New York, etc., R. Co.*, 73 App. Div. (N. Y.) 587, 77 N. Y. Supp. 128, where plaintiff's proof indicated that deceased saw an approaching car, and attempted to get out of the way, an instruction that if, by the exercise of reasonable care, deceased could have seen the car, and ought to have apprehended the danger, he was chargeable with negligence, was properly qualified by stating that deceased could see the car, and his conduct should be governed accordingly, and he could not take any chances which ordinarily careful men do not take under the circumstances; *Newport News, etc., R. Co. v. Bradford*, 100 Va. 231, 4 Va. Sup. Ct. Rep. 219, 40 S. E. 900; *West Chicago St. R. Co. v. Dougherty*, 89 Ill. App. 362.

a street crossing, the motorman in charge of a car approaching one discharging passengers is bound to keep a sharp lookout for passengers or other persons who may attempt to cross the tracks behind the other car, to have his car under such control that he can stop it upon the appearance of danger, and to give such signals as are usually given to protect travelers who are in the exercise of ordinary prudence. The traveler on the street under such circumstances has the right to rely on the exercise of such care by the motorman, but is required to exercise due care in protecting himself and in avoiding harm. Such care does not amount to the caution required to be exercised where the highway crosses the track of an ordinary railway. The traveler is not under a hard and fast obligation to stop, or to look and listen.<sup>29</sup> Reasonable care in crossing the tracks of a street railway company requires a greater degree of caution where the cars run at a high rate of speed and close together, than where they run at less speed and farther apart, or where the view is obstructed and there is much noise and confusion, than where the view is open and the surroundings quiet.<sup>30</sup> The ordinary traveler has the right of way in crossing a street car track in advance of an approaching car, if, calculating reasonably from the standpoint of a person of ordinary care and intelligence so circumstanced, he has sufficient time, proceeding reasonably, to clear the track without retarding the movement of the car if its rate of speed is lawful; and, if it turns out that he has miscalculated, he is not chargeable with want of ordinary care or with violating any rights of the railroad company, if it is compelled to retard the motion of the car or even to stop it to enable such person to cross the track.<sup>31</sup> But, when the traveler sees that the trolley car motorman is not going to respect his right to cross the street first, he must wait, or he will be guilty

**29.** *Brewer v. St. Paul City Ry. Co.*, 107 Minn. 326, 6 St. Ry. Rep. 543, 120 N. W. 382.

**30.** *Brown v. Wilmington City Ry. Co.*, 1 Penn. (Del.) 332, 40 Atl. 936, 12 Am. & Eng. R. Cas. N. S. 439.

**31.** *McQuisten v. Detroit Citizens'*

*St. Ry. Co.*, 147 Mich. 67, 5 St. Ry. Rep. 517, 110 N. W. 118; *Tesch v. Milwaukee Elec. Ry. & L. Co.*, 108 Wis. 593, 84 N. W. 823; *Newark Pass. R. Co. v. Block*, 55 N. J. L. (26 Vroom) 605, 22 L. R. A. 374, 27 Atl. 1067, 56 Am. & Eng. R. Cas. 590.

of contributory negligence if he is injured by a collision with the car.<sup>32</sup> And it has been held in an action to recover damages resulting from a collision with a street car that the obligation to use the senses of sight and of hearing before proceeding to cross the tracks of a street railway company is no less mandatory than in the case of crossing the tracks of a steam road.<sup>33</sup> But it is quite generally held that the rule as to the care required of a foot passenger crossing a steam railroad track that he must "stop, look, and listen," cannot be applied in all its strictness, or applies only in part, to pedestrians crossing street railroad tracks at intersecting streets, especially in crowded cities, where cars which can be speedily stopped pass a crossing every few minutes, and people necessarily cross the streets frequently and hurriedly, it being the duty of the railway company to have its cars under control as they approach such crossings and the pedestrian having the right to assume that those operating the cars will slow down on approaching a crossing. There is always the duty to look for an approaching car, and, if the street be obstructed, to listen, and in some situations to stop, and a plaintiff must be held to have seen that which was obvious; so that, where it appears that the plaintiff, in crossing a street, was struck by a street car just as she stepped upon the track, the view of which was unobstructed, the court should instruct the jury that she was guilty of contributory negligence.<sup>34</sup> If one crossing street car tracks looks to see if

**32.** *Schwanewede v. North Hudson Co. Ry. Co.*, 67 N. J. L. 449, 51 Atl. 696.

**33.** *Grimm v. Milwaukee Elec. Ry. & L. Co.*, 138 Wis. 44, 6 St. Ry. Rep. 464, 119 N. W. 833, citing *Goldman v. T. M. E. R. & L. Co.*, 3 St. Ry. Rep. 955, 123 Wis. 168, 170, 101 N. W. 384; *Dummer v. T. M. E. R. & L. Co.*, 108 Wis. 589, 84 N. W. 853; *Tesch v. Ry. Co.*, 108 Wis. 593, 84 N. W. 823, 53 L. R. A. 618; *Watermelon v. Fox River E. R. & P. Co.*, 110 Wis. 153, 85 N. W. 663.

**34.** See generally as to duty of pedestrian about to cross track —

*Alabama.* — *Birmingham Ry., L. & P. Co. v. Ryan*, 148 Ala. 69, 5 St. Ry. Rep. 20, 41 So. 616.

*California.* — *Higgins v. Los Angeles Ry. Co.*, 5 Cal. App. 748, 5 St. Ry. Rep. 56, 91 Pac. 344.

*Massachusetts.* — *Beirne v. Lawrence & M. St. Ry. Co.*, 197 Mass. 173, 6 St. Ry. Rep. 820, 83 N. E. 359.

*Michigan.* — *Wider v. Detroit United Ry. Co.*, 147 Mich. 537, 5 St. Ry. Rep. 519, 111 N. W. 100.

a car is coming, when the car is in fact in plain sight, and he

*Missouri.* — *Ross v. Metropolitan St. Ry. Co.*, 125 Mo. App. 614, 5 St. Ry. Rep. 668, 102 S. W. 1036.

*New Jersey.* — *Farese v. North Jersey St. Ry. Co.*, 76 N. J. L. 457, 6 St. Ry. Rep. 821, 69 Atl. 959.

*New York.* — *Cranch v. Brooklyn Heights R. Co.*, 186 N. Y. 310, 5 St. Ry. Rep. 769, 78 N. E. 1078; *revg. Cranch v. Brooklyn Heights R. Co.*, 107 App. Div. 341, 4 St. Ry. Rep. 862, 95 N. Y. Supp. 169; *Mathers v. Interurban St. Ry. Co.*, 112 App. Div. 397, 5 St. Ry. Rep. 772, 98 N. Y. Supp. 433.

*North Carolina.* — *Crenshaw v. Asheville & B. St. Ry. & Tr. Co.*, 144 N. C. 314, 6 St. Ry. Rep. 832, 56 S. E. 945.

**Should look after leaving curb.** — *Rissler v. St. Louis Transit Co.*, 5 St. Ry. Rep. 650, 87 S. W. 578.

**Should continue to look until safely across.** — *Ross v. Metropolitan St. Ry. Co.*, 113 Mo. App. 600, 5 St. Ry. Rep. 653, 88 S. W. 144.

Although a traveler is not a trespasser while on a street car track, he must exercise care commensurate with the danger of his position, or he will be chargeable with contributory negligence. If he can by looking see the approach of a car, and fails to look, and is struck, he is not entitled to recover for any injury he may sustain thereby. *Engelman v. Metropolitan St. Ry. Co.* 133 Mo. App. 514, 6 St. Ry. Rep. 484, 113 S. W. 700.

*McCauley v. Philadelphia Traction Co.*, 13 Pa. Super. Ct. 354; *Capitol Traction Co. v. Lusby*, 26 Wash. L. Rep. 163, 12 App. D. C. 295, one crossing the track of a street railway is not as strictly bound to look and

listen as at a steam road crossing; *Evansville St. R. Co. v. Gentry*, 147 Ind. 408, 37 L. R. A. 378, 44 N. E. 311, 5 Am. & Eng. R. Cas. N. S. 500; *Smith v. Electric Traction Co.*, 6 Pa. Dist. Rep. 471, 40 W. N. C. 486; *Hall v. West End St. R. Co.*, 168 Mass. 461, 47 N. E. 124, a deaf person with good eyesight is guilty of such negligence as will preclude recovery, by stepping on a street car track in the day time in front of an approaching car which he could have seen if he had looked; *Sweeny v. Scranton Traction Co.*, 5 Lack. Leg. N. 86 (Pa. C. P.), one who attempts to cross a street railroad at a place other than a crossing, so nearly in front of an approaching car, which might have been seen by her if she had looked, that she was struck as soon as she stepped on the track, was guilty of such contributory negligence as to prevent a recovery; *Balla v. Met. St. Ry. Co.*, 27 Misc. Rep. (N. Y.) 775, 57 N. Y. Supp. 746, no recovery can be had for an injury by being struck at a street crossing by horses attached to a street car, where the person injured did not look in either direction before attempting to cross, to see if a car was approaching, and it does not appear how far away the car was when she attempted to cross; *Thorsell v. Chicago City R. Co.*, 82 Ill. App. 375, one who leaves the sidewalk and without looking for cable trains from one direction passes behind a car going in the other direction, and steps immediately in front of a train approaching on the farther track, is guilty of such contributory negligence as will prevent recovery; *McCarthy v. Detroit Citizens' St. R. Co.*, 120 Mich. 400, 6 Detroit Leg. N.

testifies that he did not see it, he must have looked carelessly and

210, 79 N. W. 631, one who went behind a passing car and upon a parallel track and was struck by a car from an opposite direction was guilty of contributory negligence, where the tracks were five feet apart, and there was nothing to prevent seeing the car which caused the injury, had she looked for it after the first car passed; *Watkins v. Union Traction Co.*, 194 Pa. St. 564, 45 Atl. 321, where one was struck, just as he set foot on the track, by a car plainly visible and well lighted. See also *Driscoll v. Market St. Cable R. Co.*, 97 Cal. 553, 32 Pac. 591; *Mitchell v. Third Ave. R. Co.*, 62 App. Div. (N. Y.) 371, 70 N. Y. Supp. 1118; *Young v. Atlantic Ave. R. Co.*, 10 Misc. Rep. (N. Y.) 541, 64 St. Rep. (N. Y.) 124, 31 N. Y. Supp. 441; *Hall v. Ogden City St. R. Co.*, 13 Utah 243, 44 Pac. 1046, 4 Am. & Eng. R. Cas. N. S. 77; *Consol. Traction Co. v. Scott*, 58 N. J. L. (29 Vroom) 682, 33 L. R. A. 122, 34 Atl. 1094, 55 Am. St. Rep. 620, 4 Am. & Eng. R. Cas. N. S. 371; *Consol. Traction Co. v. Haight*, 50 N. J. L. (30 Vroom) 577, 37 Atl. 135; *Scott v. Third Ave. R. Co.*, 59 Hun (N. Y.) 456, 13 N. Y. Supp. 344; *Davenport v. Brooklyn City R. Co.*, 100 N. Y. 632, 3 N. E. 305; *Ewing v. Atlantic Ave. R. Co.*, 11 N. Y. Supp. 626; *Harnett v. Bleecker St., etc., R. Co.*, 49 N. Y. Super. Ct. 185; *Fenton v. Second Ave. R. Co.*, 126 N. Y. 625, 26 N. E. 967; *McClain v. Brooklyn City R. Co.*, 116 N. Y. 459, 465, 27 St. Rep. (N. Y.) 549; *Mentz v. Second Ave. R. Co.*, 2 Robt. (N. Y.) 356; *Brown v. Twenty-Third St. R. Co.*, 56 N. Y. Super. Ct. 356; *Sheets v. Connolly St. R. Co.*, 54 N. J. L. 518, 24 Atl. 483; *Myer v.*

*Lindell Ry. Co.*, 6 Mo. App. 27; *Gilliland v. Middlesex, etc., Traction Co.*, 67 N. J. L. 542, 52 Atl. 693.

"It is the duty of a traveler on a public street, in approaching a railway crossing, to make a reasonable use of his senses of sight and hearing, before entering into the sphere of danger, to ascertain whether the safety of his passage over the crossing is threatened by approaching cars, and to act with reasonable care to avoid an encounter with present danger. This duty continues from the time the traveler approaches danger until he passes beyond its range. In the exercise of reasonable care, he cannot give a last look just before reaching the danger line, and then, relying on the presumption that the operators of an approaching train are in the exercise of reasonable care in its operation, or on nice calculations of his chances of crossing in safety, shut his eyes and proceed blindly forward. *Cole v. Railway*, (Mo. App.) 97 S. W. 555. But a traveler has the right to presume that operators of approaching trains of cars are exercising and will continue to exercise reasonable care in approaching a crossing; and, while this presumption does not absolve him from the duty of using his senses for his own protection, still, where the appearances disclosed to reasonable observation do not indicate the presence of negligence, he has the right to continue to indulge in the presumption stated and to act thereon. *Percell v. Metropolitan St. Ry. Co.*, 126 Mo. App. 43, 6 St. Ry. Rep. 741, 103 S. W. 115.

is in no better position than if he had not looked at all.<sup>35</sup> In some States it is held that one attempting to cross a street railway track on foot is bound to look in both directions for an approaching car, and to listen, if there is any obstruction, and that his neglect to do so is negligence *per se*.<sup>36</sup> In other States

**35.** *Fitzgerald v. Boston Elev. Ry. Co.*, 194 Mass. 242, 5 St. Ry. Rep. 444, 80 N. E. 224.

When the facts clearly proven or admitted are such that a person injured at such a crossing must have seen and heard the approaching car in time to have enabled him to avoid the injury, if he had looked and listened, his protest that he did not see or hear it goes for naught. *Riedel v. Wheeling Traction Co.*, 63 W. Va. 522, 6 St. Ry. Rep. 491, 61 S. E. 821.

The failure of a person to look and listen before attempting to cross a street railway track is not, as a general rule, negligence *per se*; but when the undisputed evidence establishes exceptional circumstances, which so conclusively indicate negligence in failing to look or listen that there can be no reasonable basis for drawing a different conclusion, the question is one of law. *Schanno v. St. Paul City Ry. Co.*, 109 Minn. 43, 6 St. Ry. Rep. 457, 122 N. W. 783, citing *Shea v. Ry. Co.*, 50 Minn. 395, 52 N. W. 902; *Watson v. Ry. Co.*, 53 Minn. 551, 55 N. W. 742; *Hickey v. Ry. Co.*, 60 Minn. 119, 61 N. W. 893; *Terein v. Ry. Co.*, 70 Minn. 532, 73 N. W. 412; *Shindelus v. Ry. Co.*, 80 Minn. 364, 83 N. W. 386; *Smith v. Ry. Co.*, 95 Minn. 254, 104 N. W. 16; *Bremer v. Ry. Co.*, 107 Minn. 326, 120 N. W. 382.

**36.** *Ehrisman v. East Harrisburg City Pass. R. Co.*, 150 Pa. St. 180, 30 W. N. C. 373, 23 Pittsb. L. J. N. S.

73, 24 Atl. 596; *Schulte v. New Orleans, etc., R. Co.*, 44 La. Ann. 509, 10 So. 811; *Nugent v. Phila. Traction Co.*, 181 Pa. St. 160, 37 Atl. 206, 40 W. N. C. 243; *Buzby v. Phila. Traction Co.*, 126 Pa. St. 559, 17 Atl. 895; *Burns v. Met. St. R. Co.*, (Kan.) 71 Pac. 244; *Hoelzel v. Crescent City R. Co.*, 49 La. Ann. 1302, 22 So. 330, 38 L. R. A. 708; *Potter v. Scranton Ry. Co.*, 19 Pa. Super. Ct. 444; *Harten v. Brightwood Ry. Co.*, 18 App. D. C. 260, plaintiff held guilty of contributory negligence *per se*, precluding recovery, though she testified that she did look to see whether a car was approaching along the track where she was struck, and did not see one coming, it appearing from the evidence that the track was practically straight and unobstructed for several hundred yards, and one looking up the track for the coming car could not have failed to see it, and it was not possible for the car to traverse the space along which it was visible, between the time she should have looked for it, as she passed from one track to the other, and the moment when she stepped on the rail and was struck; *Penman v. McKeesport, etc., R. Co.*, 201 Pa. St. 247, 50 Atl. 937; *Sullivan v. Consolidated Traction Co.*, 198 Pa. St. 187, 47 Atl. 944, one who, having full opportunity to see an approaching car, steps on a street railway track and is instantly struck by the car, is guilty of contributory negligence; *Dix v. Ridge*

it is held that the test applied to determine whether or not a party was negligent in crossing a steam railroad track on the highway is not the test of the degree of care required in crossing the tracks of a street railway in a public street, and that failure to look and listen is not negligence, as matter of law.<sup>37</sup> But in the latter jurisdictions, though it may not be, as a matter of law, the absolute duty of the traveler to look and listen, it may still be determined that, as a matter of fact, in some situations, the exercise of ordinary care and prudence would require the traveler to look and listen before crossing the tracks of a street railroad.<sup>38</sup>

Ave. Pass. Ry. Co., 15 Pa. Super. Ct. 350, where a person walks along the narrow space between two trolley tracks, a place dangerous in itself, and not intended for pedestrians, without looking for a car, to recover a shoe cast by one of his horses, and is struck while stooping to pick up the horseshoe, he is guilty of contributory negligence.

In a recent case in Maryland it is declared that it has long been the settled law in this State that it is negligence *per se* for any one to attempt to cross the tracks of a railway without first looking and listening for approaching trains and stopping to look if the view is obstructed, and if he neglect these precautions and is injured by collision with a passing train, which he might have seen if he had looked or heard if he had listened, he will be presumed to have contributed to the occurrence of the accident, and unless that presumption be overcome he cannot recover for the injury. *State, to Use of Carey v. Cumberland, etc., Rys. Co.*, 106 Md. 529, 6 St. Ry. Rep. 839, 68 Atl. 197.

**37.** *Shea v. St. Paul City R. Co.*, 50 Minn. 395, 52 N. W. 902; *Holmgren v. St. Paul City R. Co.*, 61

*Minn.* 85, 63 N. W. 270; *Pyne v. Broadway, etc., R. Co.*, 19 N. Y. Supp. 217, 46 St. Rep. (N. Y.) 662; *Weiser v. Broadway, etc., R. Co.*, 10 Ohio C. C. 14, 2 Ohio Dec. 463; *Roberts v. Spokane St. Ry. Co.*, 23 Wash. 325, 63 Pac. 506; *Chisholm v. Seattle Elec. Co.*, 27 Wash. 237, 67 Pac. 601; *Frank v. St. Louis Transit Co.*, (Mo. App.) 73 S. W. 239; *Hickman v. Nassau Elec. R. Co.*, 41 App. Div. (N. Y.) 629, 58 N. Y. Supp. 858.

Failure to look and listen before crossing a street car track at a public street crossing is not, as a matter of law, negligence *per se*. *Pilmer v. Boise Traction Co.*, 14 Idaho 327, 6 St. Ry. Rep. 514, 95 Pac. 432.

Failure of a person about to cross a street railway track whether in the city or country is some evidence of negligence though not conclusive. *Peterson v. Interurban St. Ry. Co.*, 118 App. Div. (N. Y.) 210, 6 St. Ry. Rep. 816, 103 N. Y. Supp. 8.

**38.** *Warren v. Bangor, etc., Ry. Co.*, 95 Me. 115, 49 Atl. 609; *McGrath v. North Jersey St. Ry. Co.*, 66 N. J. L. 312, 49 Atl. 520; *Tacoma Ry. & Power Co. v. Hays*, 110 Fed. 496, 49 C. C. A. 115; *Newcomb v. Met. St. Ry. Co.*, 36 Misc. Rep. (N. Y.) 787, 74 N. Y. Supp. 858; *Law-*

And failure to look and listen may constitute contributory negligence as a matter of law.<sup>39</sup> The rule that failure to look and listen before crossing the tracks of an electric railway in a public street, where the cars have not the exclusive right of way, is not negligence *per se*, does not mean that one can heedlessly and carelessly cross the track without using his senses for his protection.<sup>40</sup> This duty when required, either as matter of law or as matter of fact, should be performed when and where it will be reasonably certain to effect its purpose, and diversion of attention, generally speaking, will not excuse the performance of such duty; neither will misconduct on the part of the railroad company.<sup>41</sup>

§ 420. Duty of pedestrian to look and listen — Application of rules. — Where plaintiff entered upon defendant's double car tracks without ascertaining whether a car was approaching from

son v. Met. St. Ry. Co., 36 Misc. Rep. (N. Y.) 824, 74 N. Y. Supp. 885; Madigan v. Third Ave R. Co., 68 App. Div. (N. Y.) 123, 74 N. Y. Supp. 143; Johnson v. Third Ave. R. Co., 69 App. Div. (N. Y.) 247, 74 N. Y. Supp. 599; Mathes v. Lowell, etc., Ry. Co., 177 Mass. 416, 59 N. E. 77; Judge v. Elkins, 183 Mass. 229, 66 N. E. 708, where plaintiff, before leaving a pathway and going onto a bridge, if he had looked could not have failed to have seen that the motorman in charge of an electric car was about to start the car and run the same over the bridge, and that the car would take up all the room between the sides of the bridge, but he failed to look, and proceeded onto the bridge, and was struck, he was guilty of contributory negligence; Kappus v. Met. St. Ry. Co., 82 App. Div. (N. Y.) 13, 81 N. Y. Supp. 442. See also Jackson v. Union Ry. Co. of New York, 78 N. Y. Supp. 1096.

39. Bremer v. St. Paul City Ry.

Co., 107 Minn. 326, 6 St. Ry. Rep. 543, 120 N. W. 382, citing Hooks v. Ry. Co., 147 Ala. 700, 41 So. 273; Blackwell v. Ry. Co., 193 Mass. 222, 79 N. E. 335; Price v. Ry. Co., 28 R. I. 220, 66 Atl. 200; Phillips v. Ry. Co., 104 Md. 455, 65 Atl. 422.

40. Hellieson v. Seattle Elec. Co., 56 Wash. 278, 6 St. Ry. Rep. 357, 105 Pac. 458.

41. Tesch v. Milwaukee Elec. R., etc., Co., 108 Wis. 593, 84 N. W. 823; Stafford v. Chippewa Val. Elec. R. Co., 110 Wis. 331, 85 N. W. 1036; Snyder v. People's Ry. Co., 4 Penn. (Del.) 145, 53 Atl. 433, so held where a person approached a street railway crossing at a point where his vision was obstructed; Adams v. Wilmington & N. Elec. R. Co., 3 Penn. (Del.) 512, 52 Atl. 264; Farley v. Same, 3 Penn. (Del.) 581, 52 Atl. 543; Sonnenfeld Millinery Co. v. People's Ry. Co., 59 Mo. App. 668, the duty to look and listen applies to one crossing a cable street railway; Hickey v. St. Paul

either direction, and remained standing on a rail of the west track with his back toward the south, knowing that this track was used by cars running in both directions, as the east track was being repaired, and neither looked nor listened for cars coming from the south, and was struck by a car coming from that direction, which he could have seen for a distance of five or six blocks, had he looked, he was guilty of negligence as matter of law and his want of care was accentuated by the fact that he was bereft of the sense of hearing.<sup>42</sup> It has been held that one who, before starting to cross a street on which there is an electric railroad track, looks in both directions and does not see a car, and attempts to cross in front of a heavy wagon, after which she proceeds without looking for a car, in order to get out of the way of the heavy wagon, which is approaching her without stopping, and is struck by a car coming from the direction opposite to that of the wagon, is not, as matter of law, guilty of contributory negligence, but that the question is one for the jury to determine as matter of fact.<sup>43</sup> One approaching a street railway track obscured by a dense growth of trees for a portion of the distance to the place of crossing is not relieved of the duty to look and listen for cars on reaching the crossing, by reason of having previously looked from a point commanding a view of the farther end of the growth of trees; it being possible to collide with cars already within the obscured part of the track.<sup>44</sup> One is, as a matter of law, guilty of such contributory negligence as will preclude recovery for injuries sustained by being struck by a street car, where he neglected, when two or three feet from the track, to look in the direction of an approaching car in plain view, al-

City R. Co., 60 Minn. 119, 61 N. W. 893; Wolf v. City & Suburban Ry. Co., 45 Oreg. 446, 72 Pac. 329.

42. Bennett v. Metropolitan St. Ry. Co., 122 Mo. App. 703, 6 St. Ry. Rep. 33, 99 S. W. 480.

43. Connelly v. Trenton Pass. R. Co., 56 N. J. L. 700, 29 Atl. 438.

44. Kelley v. Wakefield, etc., St. R. Co., 179 Mass. 542, 56 N. E. 285;

Henderson v. Greenfield, etc., R. Co., 172 Mass. 542, 52 N. E. 1080, a pedestrian who walks upon the track of a street railroad without looking for approaching cars and is struck by one which is so near him that the motor-man cannot avoid the collision, is guilty of contributory negligence, as matter of law, although at a point farther back where a number of tele-

though he did look when about twelve feet from the track, but could not see the car because his view was obstructed by a horse and covered wagon standing backed up to the curb of the street.<sup>45</sup> One was, as matter of law, guilty of negligence precluding recovery for injuries from being struck by a street car which turned onto the street from a cross street, in failing to look in the direction from which the car approached before crossing the track, although she had looked in that direction about two minutes before, at which time no car was in sight.<sup>46</sup> One walking at a place between street crossings behind a wagon driven on one of two street railway tracks, which prevented him from seeing a car approaching on the other track, is guilty of such contributory negligence as will prevent recovery, in stepping from the other track without looking to see whether a car is approaching on the same.<sup>47</sup> One who attempts to cross a street railway track immediately behind a car which has just passed, without looking for a car on the farther track, is guilty of such contributory negligence as will prevent recovery for his death by collision with a car on such track.<sup>48</sup> It has been held that one is not, as a matter of law, guilty of contributory negligence in passing around the rear end of a street car from which he has alighted, for the purpose of crossing the street, although he goes upon the other track in front of a car, which strikes him before he crosses the track, but in other jurisdictions he has been held guilty of contributory negligence, as matter of fact, under similar circumstances.<sup>49</sup> One

graph and telephone poles obstructed his view he looked for a car but had seen none.

**45.** *Doherty v. Detroit Citizens' St. R. Co.*, 5 Detroit Leg. N. 489, 118 Mich. 209, 76 N. W. 377; *affd.*, 80 N. W. 36.

**46.** *Healey v. Brooklyn Heights R. Co.*, 18 App. Div. (N. Y.) 623, 45 N. Y. Supp. 393.

**47.** *Bethel v. Cincinnati St. R. Co.*, 15 Ohio C. C. 381, 8 Ohio C. D. 310.

**48.** *Blaney v. Electric Trac. Co.*,

184 Pa. St. 524, 41 W. N. C. 555, 39 Atl. 294.

**49.** *Wallen v. North Chicago St. R. Co.*, 82 Ill. App. 103; *Doherty v. Troy City R. Co.*, 91 Hun (N. Y.) 28, 36 N. Y. Supp. 105; *Omaha St. R. Co. v. Lochneisen*, 40 Neb. 37, 58 N. W. 535; *Baltimore Traction Co. v. Helms*, 84 Md. 515, 36 L. R. A. 215, 36 Atl. 119; *Pelletreau v. Met. St. Ry. Co.*, 74 App. Div. (N. Y.) 192, 77 N. Y. Supp. 386; *affd.*, 174 N. Y. 503, 66 N. E. 1113, where plaintiff after

who attempts in the middle of a block to cross a street railway track, immediately behind a car, without looking for a car coming from the other direction on the farther track, is guilty of such negligence as will preclude recovery for injuries sustained by collision with such car.<sup>50</sup> But one is not guilty of contributory negligence, as matter of law, in failing to look for the approach of street cars, or in attempting to cross the street on a dark evening at a regular crossing, so as to preclude recovery for injury from being struck by a car, the headlight of which was dim, and which approached without giving the usual signal.<sup>51</sup> Nor is one guilty of contributory negligence, as matter of law, in leaving the sidewalk after looking before crossing the street, where the view from the walk was unobstructed, and a car by which he was struck approached without sound of bell or warning of danger.<sup>52</sup> And, though there be want of ordinary care in getting in front of a street car, if this does not contribute to the injury, but is a mere condition before the accident, the proximate cause of which is the negligence of the street railway, there may be a recovery.<sup>53</sup> But that one looked and listened before attempting to cross a street railway track does not excuse his want of ordinary care while he was crossing it; and the want of such care precludes recovery for injuries from being struck by a car.<sup>54</sup> One who attempted to run diagonally across an electric railway track immediately in front of an approaching car, which he could have seen if he had looked, has been held guilty of such contributory negligence as will prevent a recovery for his death.<sup>55</sup>

looking without seeing another car in sight attempted to cross, but her vision in the direction of an approaching car was obscured by the car behind which she had passed, it was held that she was not negligent. *Smith v. City & S. R. Co.*, 29 *Oreg.* 539, 46 *Pac.* 136, 5 *Am. & Eng. R. Cas. N. S.* 163, rehearing denied, 29 *Oreg.* 546, 46 *Pac.* 780.

**50.** *Burgess v. Salt Lake City R. Co.*, 17 *Utah* 406, 53 *Pac.* 1013.

**51.** *North Chicago St. R. Co. v.*

*Nelson*, 3 *Chic. L. J. Wkly.* 582, 79 *Ill. App.* 229.

**52.** *Curtin v. Met. St. Ry. Co.*, 22 *Misc. Rep. (N. Y.)* 83, 48 *N. Y. Supp.* 581; *affg.* 21 *Misc. Rep. (N. Y.)* 788, 47 *N. Y. Supp.* 1134.

**53.** *Roberts v. Spokane St. Ry. Co.*, 23 *Wash.* 325, 63 *Pac.* 506.

**54.** *Rauscher v. Phila. Traction Co.*, 176 *Pa. St.* 349, 38 *W. N. C.* 479, 35 *Atl.* 138.

**55.** *Doller v. Union R. Co.*, 7 *App. Div. (N. Y.)* 283, 39 *N. Y. Supp.* 770.

§ 421. **Contributory negligence of pedestrians in going on or across tracks.** — A traveler who attempts to cross a street railroad track on which a car is approaching is not *per se* negligent, for whether an attempt to cross a street railroad track on which a car is approaching is negligence must depend on the apparent distance of the approaching car from the place of crossing and other surrounding circumstances.<sup>56</sup> But a person going on or across a street railroad is held to what, under all the circumstances of the case, is the exercise of ordinary or reasonable care.<sup>57</sup> Though a pedestrian has an equal right with a street railway company to the use of a public crossing, he cannot enter thereon, without taking any precautions for his safety, merely because, at the instant of his entry, it is not actually occupied by a car; for, in view of physical differences between the parties, this would give him a superior right.<sup>58</sup> The mere fact, however, that a person can see an approaching car by which he is afterwards struck, does not in itself establish contributory negligence. It must not only be approaching but must be in such close proximity that, taking into account the reasonable rate of speed for such places and under present conditions, or apparent rate of speed at which the car is traveling, a reasonably prudent man would not attempt to cross.<sup>59</sup> A person is not required to refrain from crossing a

56. *West Chicago St. R. Co. v. Dedloff*, 92 Ill. App. 547; *Schneider v. Market St. Ry. Co.*, 134 Cal. 482, 66 Pac. 734.

**Contributory negligence is for jury.** — *Pilmer v. Boise Trac. Co.*, 14 Idaho 327, 6 St. Ry. Rep. 514, 95 Pac. 432.

57. *Kernan v. Market St. Ry. Co.*, 137 Cal. 326, 70 Pac. 81; *McLaughlin v. New Orleans, etc., R. Co.*, 48 La. Ann. 23, 18 So. 703; *Hawthorne v. Cincinnati St. R. Co.*, (C. P.) 2 Ohio Dec. 548, a higher degree of care is required in crossing the tracks of an electric street railway than those upon which the cars are drawn by

horses; *Thompson v. Buffalo Ry. Co.*, 145 N. Y. 196, 39 N. E. 709, whilst persons have the right to cross streets at any place they may select, and are not confined to street crossings, street railway cars between such crossings have a preference, and, while they must be managed with care so as not to injure persons in the street, pedestrians must, nevertheless, use reasonable care to keep out of their way.

See preceding section as to degree of care required.

58. *Riedel v. Wheeling Trac. Co.*, 63 W. Va. 522, 6 St. Ry. Rep. 491, 61 S. E. 821.

59. *Saylor v. Union Traction Co.*,

street car track from the mere fact that a car is in sight. There are cases where he may properly exercise his judgment upon the question whether he should attempt to cross and in such cases he may or may not be guilty of contributory negligence according to the circumstances.<sup>60</sup> If the car is at such a distance from him that he has ample time to cross if it is run at the usual speed, it cannot be said, as a matter of law, that he is negligent in going on.<sup>61</sup> But one who attempts to cross a street at a public crossing ahead of a street car, when the danger is so obvious that reasonable men could not differ in opinion about it, assumes the risk of injury; and, in the absence of proof that the car could have been stopped in time to have prevented the injury, after the servants in charge of it had perceived the danger, is guilty of contributory negligence, as matter of law, and thereby precluded from recovery of damages for his injury.<sup>62</sup> So where a person about to cross a street car track observes a car that is coming toward him at an unreasonable rate of speed, or if in the exercise of ordinary care he ought to observe it, such care requires him to take that fact into consideration in determining the probability of his being able, proceeding reasonably under the circumstances, to clear the track and avoid being injured by a collision with the car. An ordinary traveler on a public street, where a street car line is located and operated under a public franchise having no restrictions or regulations as to the manner of operating cars, has not the same right to go on the track and compel the stopping of a car to enable him to pass over the track as the operator of the car has to delay his passage to enable the car to pass.<sup>63</sup> A pedestrian, seeing negligence on the part of the servants of a street railway company in running its car to a public crossing, or in a position in which he must have seen it, as well as the danger in

40 Ind. App. 381, 5 St. Ry. Rep. 239, 81 N. E. 94.

**60.** *Wider v. Detroit United Ry. Co.*, 147 Mich. 537, 5 St. Ry. Rep. 519, 111 N. W. 100.

**61.** *Wolf v. City Ry. Co.*, 50 Oreg. 64, 6 St. Ry. Rep. 265, 91 Pac. 460.

**62.** *Riedel v. Wheeling Trac. Co.*, 63 W. Va. 522, 6 St. Ry. Rep. 491, 61 S. E. 821.

**63.** *Tesch v. Milwaukee Electric Ry. & L. Co.*, 108 Wis. 593, 84 N. W. 823.

attempting to cross ahead of it, if he had used his faculties of sight and hearing, cannot justify or excuse his assumption of an obvious risk of injury in attempting to cross on the ground that his right to the use of the crossing is equal to that of the railway company. The vital question under such circumstances is relative negligence, not relative right.<sup>64</sup> That the plaintiff was guilty of contributory negligence in attempting to cross the track in front of the advancing car is held to depend upon the assumption that when he saw the car he knew how fast it was going.<sup>65</sup> One is guilty of contributory negligence who crosses a street railroad track when it is evident to him that he cannot pass in safety unless the motorman stops or slackens the speed of an approaching car, and his failure to defer crossing until the car has passed, or to continue to watch the car, although it may not constitute contributory negligence, as a matter of law, is a question for the jury.<sup>66</sup> A person exercising due care in looking for approaching vehicles has a right to cross a city street at any point, without being chargeable with contributory negligence, yet he is chargeable with negligence if he sees an approaching car, or could have seen one by the exercise of reasonable care, and does not take proper steps to avoid it. He is not at liberty to take even doubtful chances of the consequences of crossing the street in the face of danger, or in reliance upon a successful attempt of the driver to slacken the speed of the horses or the motorman to stop his car.<sup>67</sup> Whether a person is negligent or not in attempting to go upon or across a track in front of a car must be determined by the facts and circumstances of each particular case, and, as accidents happen under many different conditions and circumstances, the courts have found it difficult to establish rules of general appli-

**64.** *Riedel v. Wheeling Trac. Co.*, 63 W. Va. 522, 6 St. Ry. Rep. 491, 61 S. E. 821.

**65.** *Metropolitan St. Ry. Co. v. Summers*, 75 Kan. 342, 6 St. Ry. Rep. 750; 89 Pac. 652.

**66.** *Williamson v. Met. St. Ry. Co.*, 29 Misc. Rep. (N. Y.) 324, 60

N. Y. Supp. 477; *Hicks v. Nassau Elec. R. Co.*, 47 App. Div. (N. Y.) 479, 62 N. Y. Supp. 597; *Baxter v. Second Ave. R. Co.*, 3 Robt. (N. Y.) 510, 30 How. Pr. (N. Y.) 219.

**67.** *McClain v. Brooklyn City R. Co.*, 116 N. Y. 459, 27 St. Rep. (N. Y.) 549, 22 N. E. 1062; *Adolph v.*

cation. The test of contributory negligence or want of due care is not always found in the failure to exercise the best judgment or to use the wisest precaution. Some allowance may be made for the influences which ordinarily govern human action, and what would, under some circumstances, be a want of reasonable care might not be such under others. While acting on error in judgment under some circumstances may constitute negligence, such is not the necessary consequence of it under all circumstances.<sup>68</sup> Usually, therefore, the question is for the jury, and only in exceptional cases can the court answer it.<sup>69</sup> But the failure of a pedestrian to use sufficient care in crossing a street railway track will not in some jurisdictions prevent a recovery for injuries by being struck by a car coming rapidly around a short curve, if by the use of reasonable care the driver could have

Central Park, etc., R. Co., 76 N. Y. 530; *Davenport v. Brooklyn City R. Co.*, 100 N. Y. 632, 3 N. E. 305.

**68.** *Lent v. New York Cent., etc., R. Co.*, 120 N. Y. 467, 31 St. Rep. (N. Y.) 538, 24 N. E. 653; *Lowery v. Manhattan R. Co.*, 99 N. Y. 158, 1 N. E. 608; *Sherry v. New York Cent., etc., R. Co.*, 104 N. Y. 652, 10 N. E. 128; *McIntyre v. New York Cent., etc., R. Co.*, 37 N. Y. 287.

**69.** *Pilmer v. Boise Traction Co.*, 14 Idaho 327, 6 St. Ry. Rep. 514, 95 Pac. 432; *Friedman v. Dry Dock, etc., R. Co.*, 11 N. Y. Supp. 429, 110 N. Y. 676, 18 N. E. 482; revg. 3 St. Rep. (N. Y.) 557, where a man sixty-seven years of age attempted to cross a street car track and wade through or leap over a snow bank two or three feet high, in order to get a rapidly moving street car, in which attempt he fell between the car and snow bank and received injuries causing his death.

In respect to an instruction that "if the jury find from the evidence

that when the plaintiff started to cross Amsterdam avenue the car was at such a distance as to warrant the assumption of safety by the plaintiff in the attempt to cross it is immaterial whether plaintiff looked or did not look to observe the approaching car," the Appellate Court said: "It is apparent, we think, that this instruction was unnecessary, inappropriate, and misleading. It took away from the consideration of the jury every incident connected with the plaintiff's acts in crossing the street and left to their determination the simple question of the distance of the car from the plaintiff when he first observed it, as warranting his assumption of safety in an attempt to cross; that is to say, if the car was far enough away to enable the plaintiff to cross, irrespective of all other conditions, he was absolved from any obligation of attention or observation. *Margulies v. Interurban St. Ry. Co.*, 116 App. Div. (N. Y.) 157, 6 St. Ry. Rep. 818, 101 N. Y. Supp. 499.

avoided the consequences of the former's negligence and prevented the accident.<sup>70</sup>

**§ 422. Contributory negligence of pedestrians — Instances when none.** — The general rules stated have been applied in many cases which will serve as illustrations. It has been held that it is not contributory negligence to attempt to cross a street railroad track, although a vehicle was approaching, where there was ample time to do so, and that the possible danger of failing is not to be considered, but later cases hold otherwise, where plaintiff errs in judgment as to his chances of doing it safely, or in the absence of evidence that the driver or motorman could have avoided the injury by arresting the car after the fall;<sup>71</sup> that it is not contributory negligence for a person to cross a car track in the middle of a block on a dark night, where he looked and saw a car which appeared to be stationary, at the street intersection;<sup>72</sup> that one

**70.** North Baltimore Pass. R. Co. v. Arnreich, 78 Md. 589, 28 Atl. 809.

**71.** Fenton v. Second Ave. R. Co., 56 Hun (N. Y.) 99, 29 St. Rep. (N. Y.) 962, 9 N. Y. Supp. 162; Baxter v. Second Ave. R. Co., 3 Robt. (N. Y.) 510, 30 How. Pr. (N. Y.) 219, holding it not to be contributory negligence; Motel v. Sixth Ave. R. Co., 99 N. Y. 632, holding it contributory negligence where a child wilfully crossed; Belton v. Baxter, 54 N. Y. 247, holding the same where the plaintiff miscalculated as to having time enough to cross in safety; Aaron v. Second Ave. R. Co., 2 Daly (N. Y.) 127; Fenton v. Second Ave. R. Co., 126 N. Y. 625, 36 St. Rep. (N. Y.) 385, 26 N. E. 967; revg. 56 Hun (N. Y.) 99, *supra*, holding that the company is not liable in the absence of evidence that the driver could have avoided the injury by arresting the car after the fall; Manahan v. Steinway, etc., R. Co., 35 St. Rep.

(N. Y.) 813, 26 N. E. 736, 125 N. Y. 760, holding the company not liable for injuries to a boy who, knowing the danger incurred, attempts to cross a track in front of a car, and errs in judgment as to the chances of doing it safely; Freeman v. Brooklyn Heights R. Co., 81 N. Y. Supp. 828, where plaintiff testified that he thought he could get across, as he thought the car would stop at one of the crossings to give him a chance to cross, but there was no proof that the car was bound to stop at the crossing, or that plaintiff had reasonable grounds for his belief that it would do so, it was held that he was guilty of contributory negligence; Curry v. Rochester R. Co., 35 N. Y. Supp. 543, 70 St. Rep. (N. Y.) 146, one who without looking started to cross the track, and slipped on the track in front of an approaching car, held guilty of contributory negligence.

**72.** Gildea v. Met. St. Ry. Co., 58

crossing a street is not guilty of contributory negligence, as a matter of law, in stepping back upon a street car track in front of an approaching car which he had not seen, although he looked along the track just before leaving the sidewalk, to avoid a car upon another track, by which he was unexpectedly confronted;<sup>73</sup> that the fact that the member of a band carelessly walks so near a street car track as to be hit by a passing car does not, as matter of law, relieve the company from liability, where the motorman knowing his danger drives his car against him at a high rate of speed without giving warning;<sup>74</sup> that one crossing a street in front of a horse car is not, as matter of law, negligent in failing to observe that the car is moving at more than twice its usual rate of speed, or in assuming that the driver will obey the customary signal of one who desires to take the car;<sup>75</sup> that, where plaintiff was injured by being caught between an uptown and a downtown street car which she had seen approaching before she attempted to cross the street, the one that struck her being the more distant at the time she looked, and running upon her as she was waiting between the tracks for the other car to pass, a dismissal upon the ground of contributory negligence was not necessary, and a verdict for damages should be sustained.<sup>76</sup> It does not show contributory negligence *per se* for one to attempt to cross a street car track, though a car is approaching at a high rate of speed, as, for instance, where a pedestrian attempts to walk from a curb across a car track, a distance in all of thirteen

App. Div. (N. Y.) 528, 69 N. Y. Supp. 568; *affd.*, 64 N. E. 1121, 171 N. Y. 660.

**73.** *McCormick v. Brooklyn City R. Co.*, 10 Misc. Rep. (N. Y.) 8, 62 St. Rep. (N. Y.) 647, 30 N. Y. Supp. 529.

**74.** *Montgomery v. Lansing City Elec. R. Co.*, 103 Mich. 46, 61 N. W. 343; *Brown v. Broadway, etc., R. Co.*, 50 N. Y. Super. Ct. 106, a person parading the streets without special license is bound to exercise ordinary

vigilance in avoiding danger the same as any ordinary traveler on the street, and cannot recover for injuries received in a collision with a street car when he had ample opportunity to avoid it.

**75.** *Lang v. Houston, etc., R. Co.*, 75 Hun (N. Y.) 151, 58 St. Rep. (N. Y.) 594, 27 N. Y. Supp. 90.

**76.** *O'Callaghan v. Met. St. Ry. Co.*, 69 App. Div. (N. Y.) 574, 75 N. Y. Supp. 171.

feet, while a horse car travels one hundred feet, or where an adult attempts to cross near a crosswalk in plain view of a motorman of a car one hundred and thirty feet distant, or where one attempts to cross a cable car track while an approaching car is one hundred feet away, since he has a right to assume that the car is under control of the driver, motorman, or gripman, and will be operated with due regard to his rights as a traveler on the highway.<sup>77</sup> Thus, where plaintiff, who had signaled to defendant's trolley car when it was about half a block away, crossed diagonally before it to the opposite curb, where she was to board the car, and it struck her just as one foot was on the curb to step up on the sidewalk near which the car ran, it was held that the questions of negligence should have been submitted to the jury, and a dismissal was error.<sup>78</sup> A person approaching a street railway crossing on a busy street in a populous city, seeing a car approaching at ordinary speed on a down grade, half a block away, is not guilty of contributory negligence as a matter of law in attempting to cross in front of the car.<sup>79</sup> In an action to recover damages resulting from a collision with defendant's street car it appeared that plaintiff, having been passed by a street car, thereafter seeing the car standing at the station two hundred and thirty feet away, and believing that it would continue in the same direction, started to cross the track in the rear of the car and was injured. It was held that the plaintiff was not guilty of contributory negligence as a matter of law.<sup>80</sup>

**77.** *Frank v. Met. St. Ry. Co.*, 58 App. Div. (N. Y.) 100, 68 N. Y. Supp. 537; *affd.*, 171 N. Y. 666, 64 N. E. 1121; *Ehrman v. Nassau Elec. R. Co.*, 23 App. Div. (N. Y.) 21, 48 N. Y. Supp. 379; *Cass v. Third Ave. R. Co.*, 20 App. Div. (N. Y.) 591, 47 N. Y. Supp. 356; *Mills v. Brooklyn City R. Co.*, 10 Misc. Rep. (N. Y.) 1, 62 St. Rep. (N. Y.) 645, 30 N. Y. Supp. 532, or where a man seventy years old attempts to cross in front of a horse car sixty feet from the crosswalk, when it is not necessary

for him to walk more than twelve and one-half feet to clear the tracks; *Wells v. Brooklyn City R. Co.*, 58 Hun (N. Y.) 389, 12 N. Y. Supp. 67, or where one passes in front of a horse car running at an ordinary rate of speed fifty feet distant.

**78.** *Copeland v. Met. St. Ry. Co.*, 67 App. Div. (N. Y.) 483, 73 N. Y. Supp. 856.

**79.** *Keefe v. Seattle Electric Co.*, 55 Wash. 448, 6 St. Ry. Rep. 434, 104 Pac. 774.

**80.** *Wilson v. Seattle R. & S. Ry.*

Where plaintiff's view was obstructed by pillars supporting an approach to a bridge for a distance of a block and the sidewalk was full of people and she testified that, as she went to step from the curb, she looked and was struck, before she could recover herself, by a rapidly approaching car on a track two and a half feet from the curb, it was declared that, although she erred in judgment, the error did not establish want of ordinary care as a matter of law.<sup>81</sup> One who attempts to cross a street at a crossing, with but fifteen feet to pass over, in order to reach a place of safety at a time when a car is approaching from a distance of one hundred and twenty-five feet, is not, as a matter of law, guilty of contributory negligence.<sup>82</sup> Where a trolley company applies a lubricant to its tracks along a public street in order that its cars may pass around a curve more easily, it is its duty to make the application in such manner as not to endanger the safety of persons entitled to use the street. In crossing a public street at a corner where a pavement crossing has been laid, the plaintiff had a right to assume that it was a safe place to walk over, and that there was no danger in doing so, unless warned to the contrary, and, when passing along the crossing, was not guilty of contributory negligence, because, in observing an approaching street car, to avoid danger from it, she inadvertently stepped upon a portion of the crossing covered with oil, put there by defendant as a track lubricant, and was thrown down and injured.<sup>83</sup>

§ 423. Contributory negligence of pedestrians — Instances of. —

On the other hand it has also been held that one who, while nearing a street railway track at night and while fifty feet therefrom, saw a trolley car approaching at a distance of two hundred and fifty feet, and upon reaching the track, which he crossed diagonally, glanced back without seeing the car by which he was struck

Co., 55 Wash. 651, 6 St. Ry. Rep. 460, 104 Pac. 1112.

**81.** *Ring v. Nassau Elec. R. Co.*, 115 App. Div. (N. Y.) 674, 6 St. Ry. Rep. 814, 101 N. Y. Supp. 389.

**82.** *Duffy v. Interurban St. Ry.*

Co., 52 Misc. Rep. (N. Y.) 177, 6 St. Ry. Rep. 817, 101 N. Y. Supp. 767.

**83.** *Slater v. North Jersey St. Ry. Co.*, 75 N. J. L. 890, 6 St. Ry. Rep. 288, 69 Atl. 163.

before he could get across, was guilty of contributory negligence in view of his knowledge of the danger;<sup>84</sup> that one who, after seeing two street cars approach each other from opposite directions on the two tracks of the road, undertook to cross both tracks at a point between the cars not at a crossing, was guilty of contributory negligence precluding recovery for his death from being caught between the cars;<sup>85</sup> that one who attempts to cross a street railway track at a point other than a crossing, immediately behind a moving car on the track nearest to him, is guilty of such contributory negligence as will preclude recovery for injuries sustained by being struck by a car approaching from the opposite direction on the other track;<sup>86</sup> that one attempting to cross a street while a street car is so near the crossing as to allow him barely time to avoid it is guilty of contributory negligence, as matter of law, precluding recovery for injuries from being struck by another car approaching from an opposite direction on a second track, and which was so near the crossing when he started that prudence would have dictated that he should not attempt to cross in front of it, even in the absence of the other car;<sup>87</sup> that one who attempts to cross a street car track in front of a car running seven miles an hour when it is only a few feet distant is guilty of contributory negligence, although the company was also negligent;<sup>88</sup> that one who jumps in front of an electric car when it is a short distance away and he has seen it in ample time to get out of the way cannot recover for injuries sustained thereby;<sup>89</sup> that one in possession of her faculties, crossing a street on a crossing, is guilty of contributory negligence, as matter of law, in walking against a street car which is in plain sight, although she testified that she looked and did not see it, and one is likewise negligent who in the night stepped from a moving car before it

**84.** *Jewett v. Paterson R. Co.*, 62 N. J. L. 434, 41 Atl. 707.

**85.** *Meyer v. Pittsburg, etc., Trac. Co.*, 189 Pa. St. 414, 42 Atl. 41.

**86.** *Griegard v. St. Paul City R. Co.*, 72 Minn. 181, 75 N. W. 221.

**87.** *Hurdle v. Washington & G. R.*

*Co.*, 8 App. D. C. 120, 24 Wash. L. Rep. 132.

**88.** *Watson v. Mound City St. R. Co.*, 133 Mo. 246, 34 S. W. 573.  
3 Am. & Eng. R. Cas. N. S. 385.

**89.** *Jager v. Coney Island, etc., R.*

reached a crossing, and, while attempting to cross another track five feet distant, walked against a car brilliantly lighted going in the opposite direction;<sup>90</sup> that the negligence of a passenger on an electric railroad who, on getting off before the car stops at a place which is not a public crossing, attempts to cross a parallel track when a train thereon is due, without looking, and is immediately struck by a train coming from the other direction, is not excused by the fact that it was running at too high a rate of speed, and without giving proper signals;<sup>91</sup> that one is guilty of contributory negligence in walking upon an electric street railway track without looking or listening for a car from one direction, after leaving the curb fourteen feet from the track, and that one who voluntarily walks upon a street railway track at night, with full knowledge that a car may come up at any moment, cannot recover damages for injuries where, by ordinary care, he could learn of the approach of the car, and the driver by reasonable diligence could not avoid the accident;<sup>92</sup> that a street railroad company is not liable

Co., 84 Hun (N. Y.) 307, 65 St. Rep. (N. Y.) 539, 32 N. Y. Supp. 304.

**90.** *McQuade v. Met. St. Ry. Co.*, 17 Misc. Rep. (N. Y.) 154, 39 N. Y. Supp. 335; *Stowers v. Citizens' St. R. Co.*, 21 Ind. App. 435, 52 N. E. 710.

**91.** *MacLeod v. Graven*, 19 C. C. A. 616, 43 U. S. App. 129, 73 Fed. 627.

**92.** *McGee v. Consol. St. R. Co.*, 102 Mich. 107, 26 L. R. A. 300, 60 N. W. 293; *Smith v. Crescent City R. Co.*, 47 La. Ann. 833, 17 So. 302; *Hickman v. Nassau Elec. R. Co.*, 36 App. Div. (N. Y.) 376, 56 N. Y. Supp. 751, a woman fifty-six years old, in good health and in the possession of her faculties, with an unobstructed view of a street railway track for several blocks, who, after glancing up and down the street from the sidewalk, walks deliberately on the track in full view of an approach-

ing car with its bell ringing, is guilty of contributory negligence precluding recovery for injuries sustained from being struck by the car; *Pfeiffer v. Chicago City Ry. Co.*, 96 Ill. App. 10, a street railroad company is not liable for injuries to a boy who, just before he was injured, was proceeding behind a wagon and suddenly attempted to cross the track at a moment when the car was abreast of him, or so nearly so that the motor-man, in the exercise of every reasonable precaution in operating the car, could not avoid striking him; *Downs v. St. Paul City Ry. Co.*, 75 Minn. 41, 77 N. W. 408, a boy sixteen years of age who knew that cars frequently passed across the switch track leading out of the car barn is guilty of such contributory negligence as will bar recovery, where he heedlessly passed in front of the building without looking for a car which slowly

for the death of a person who, on a clear night, steps behind a cable car going in one direction, in front of another going in an opposite direction, having a bright headlight and visible for a long distance, although proceeding at a high rate of speed, and the gripman, having seen such person standing at the side of the track engaged in conversation, had turned his head away;<sup>93</sup> that the question of sudden peril, as preventing an act otherwise negligent from being considered contributory negligence, does not apply to the case of a person who, attempting to escape imminent peril from drays and wagons, throws himself in front of a moving street car whose owner and its servants are not guilty of negligence;<sup>94</sup> that a street railroad company whose employees in good faith tried to and did stop a car within a foot of the place where it struck a person, who had negligently stepped back in front of an approaching car when only ten or fifteen feet from it, is not guilty of such wilful negligence as to entitle such person to recover, notwithstanding her own negligence;<sup>95</sup> that the unconscious misjudgment, mistake, or mismove of a motorman in manipulating the appliances to stop his car after having reasonable grounds to apprehend a collision, but for which the collision would not have occurred, does not render the company liable to a person injured in the collision, who was guilty of contributory negligence in failing to look out for a car, and in failing to get off the track after discovering the car.<sup>96</sup> Where it appeared that plaintiff's intestate, who was forty-five years of age, while walking in the outskirts of a city after midnight on a dark, misty night, attempted to cross the street in the middle of a block in front of an approaching car, which was less than one hundred feet away when she was four feet

approached and struck him; *Webster v. New Orleans City, etc., Co.*, 51 La. Ann. 299, 25 So. 77, one is guilty of such negligence as will prevent a recovery for injuries, in attempting to cross a street railway track immediately in front of a car which is approaching him, the motorman on which sounds the gong continually.

**93.** *Scott v. Third Ave. R. Co.*, 41 St. Rep. (N. Y.) 152, 16 N. Y. Supp. 350, 19 Wash. L. Rep. 827.

**94.** *Trowbridge v. Danville St. Car Co.*, (Va.) 19 S. E. 780.

**95.** *Bailey v. Market St. Cable R. Co.*, 110 Cal. 320, 42 Pac. 914.

**96.** *Lockwood v. Belle City St. R. Co.*, 92 Wis. 97, 65 N. W. 866.

from the track, and which was moving at a speed of from six to nine miles an hour, with its headlight burning, and was struck by the car and killed, and it appeared that there was no paving or flagging at the point in question and that the road was badly washed and the dirt washed away from the rails and ties, and that plaintiff's intestate saw the car coming, the court declared an appeal from a judgment for plaintiff, that if there were sufficient light so that she saw the track in its rough condition there can be no question that she was guilty of negligence in attempting to cross ahead of the car. If it were so dark she could not see the roughness of the track, as is the more probable, she is no less guilty of negligence, for she took her chances of getting across an unknown space within the few seconds allowed her before the car should reach the spot. After twelve o'clock, upon a dark, rainy night, she had no right to assume that a motorman on the car would see her and check his car if she failed to get over.<sup>97</sup> Where a plaintiff admitted that although she saw the car coming, and that it was moving rapidly, she took the risk of crossing in front of it, the court said: "This the exercise of a reasonable judgment would, under the circumstances, forbid if she desired to avoid a collision, and when she was near the track, and saw the car approaching in the manner described by her, she was not in a position to 'justify her proceeding to cross, under a reasonable belief that she could do so with reasonable safety if both she and the motorman were in the exercise of reasonable care.' She could as well pass in the rear of the car as in front; her sole purpose being to reach the other side of the car. Reasonable minds can hardly differ as to the impropriety of the plaintiff's act when she herself admits that it was a risk, apparent to her, to undertake to cross in front of the car. On the whole case, we think her conduct contributed to the accident."<sup>98</sup> It has also been held that a person crossing a street railway track may recover for injuries from

**97.** *Healy v. United Traction Co.*, 115 App. Div. (N. Y.) 868, 6 St. Ry. Rep. 815, 101 N. Y. Supp. 331. *St. Ry. Co.*, 76 N. J. L. 185, 6 St. Ry. Rep. 821, 68 Atl. 1074, citing *Bauer v. New Jersey St. Ry. Co.*, 74 N. J.

**98.** *Glasco v. Jersey City, H. & P.* L. 624, 65 Atl. 1037.

being run over by the car, though guilty of contributory negligence, where, after the person in charge of the car saw her on the track or approaching the track under circumstances of peril, or might by proper care have seen her, they could have avoided the injury by ordinary care in the management of the car; <sup>99</sup> and that an electric railroad company is not liable for the death of one guilty of contributory negligence in stepping on the track, unless those operating the car causing her death could, by the exercise of due care and caution after her negligent act, have realized and averted the danger.<sup>1</sup>

**§ 424. Contributory negligence of pedestrians in standing on or near tracks or walking along tracks.** — The courts, applying to the circumstances of particular cases the rule that pedestrians must use ordinary and reasonable care to avoid accidents when on or near street railroad tracks, in order to determine the question of the pedestrian's contributory negligence, have held that where a pedestrian is standing near a car track at night, upon a frequented thoroughfare, giving no indication of an intention to cross, and attempts to cross only when a rapidly moving car is so near him as to render it practically impossible for the motorman to prevent striking him, there can be no recovery for injuries sustained; <sup>2</sup> that where a person standing near the track was injured by the rear end of the car as it rounded a curve, he was negligent in not observing the simple and obvious precaution of stepping back; <sup>3</sup>

**99.** *Baltimore Traction Co. v. Wallace*, 77 Md. 435, 21 Wash. L. Rep. 313, 26 Atl. 518.

**1.** *Houston City St. R. Co. v. Farrell*, (Tex.) 27 S. W. 942.

**2.** *Knoker v. Canal & C. R. Co.*, 52 La. Ann. 806, 27 So. 279.

**3.** *Matulewicz v. Metropolitan St. Ry. Co.*, 107 App. Div. (N. Y.) 230, 4 St. Ry. Rep. 861, 95 N. Y. Supp. 7. See also *Hoffman v. Philadelphia Rapid Transit Co.*, 214 Pa. St. 87, 4 St. Ry. Rep. 964, 63 Atl. 409.

Where plaintiff, standing beside the

track of a street railway at a curve, fails to step far enough back to escape being struck by the rear end of a car as it projects in swinging around the curve, no negligence can be imputed to the motorman, running in the ordinary way and having no reason to think that plaintiff would remain where he was likely to be struck. The careless conduct of the plaintiff is the cause of the accident. *Jelly v. North Jersey St. Ry. Co.*, 76 N. J. L. 191, 5 St. Ry. Rep. 533, 68 Atl. 1091.

that where a person stopped on street car tracks to adjust the leg of his trousers, and although he looked when he stepped on the track, did not look again, he was not in the exercise of due care; <sup>4</sup> that where a person was struck by a car while in the act of stepping down backward from the hub of the wagon wheel toward a railway track but two feet distant from the wheel without taking the slightest precaution to ascertain if a car was approaching, and he could have seen the car in time to save himself if he had simply turned around and looked, a clear case of negligence contributing to the accident was shown; <sup>5</sup> that a person, influenced in his actions by the call of some one on the street, so that he stops and stands in the middle of a street car track immediately in front of an approaching train, is guilty of contributory negligence precluding recovery for injuries caused by his being struck by the train, although the gripman was negligent; <sup>6</sup> that a street railway company is not liable for injuries sustained by one who was struck by the handle on the rear dasher of a car as it rounded a corner, where she was standing near the track waiting for the car to pass and saw it before it reached her, but thought she was far enough away from it to be safe, and there was no defect in the car or its equipments or improper management of either, and no defect in the track; <sup>7</sup> that, where the plaintiff saw the electric motor which struck him approaching him while it was a long distance from him, and if he had remained where he then stood would not have been injured, but he jumped in front of the car, negligence could not be imputed to the motorman for not stopping the car; <sup>8</sup> that, where plaintiff was pushing a hand cart between defendant street railway company's track and the sidewalk, and, on seeing a car approaching, called to the driver to stop, but made no effort to do so himself, continuing to push his cart toward the car until he collided with it, although he could have returned to the sidewalk

4. *Jordan v. Old Colony St. Ry. Co.*, 188 Mass. 124, 4 St. Ry. Rep. 460, 74 N. E. 315.

5. *State, to Use of Carey v. Cumberland, etc., Rys. Co.*, 106 Md. 529, 6 St. Ry. Rep. 839, 68 Atl. 197.

6. *Webb v. Chicago City Ry. Co.*, 83 Ill. App. 565.

7. *Widmer v. West End. St. R. Co.*, 158 Mass. 49, 32 N. E. 899.

8. *Jager v. Coney Island, etc., R. Co.*, 84 Hun (N. Y.) 307, 65 St. Rep.

where he was previously pushing his cart, he was guilty of contributory negligence, as a matter of law;<sup>9</sup> that where plaintiff, who, while unloading heavy beams from a wagon in the street, was obliged to stand so near the track as to expose himself to the danger of being hit by the cars, admitted that while unloading the wagon he had stepped aside to allow two cars to pass, that he had been engaged in the work for some time, and knew that cars were continually passing, and was aware of the danger, and also that the position assumed by him was the most dangerous one, the court should have directed a verdict for the defendant on plaintiff's testimony;<sup>10</sup> that one who, for convenience in walking, negligently, and without looking for approaching cars, entered a pass only wide enough for cars to pass, through a snow drift, with vertical walls or banks on each side, and was struck while standing between the track and wall to allow the car to pass, cannot recover for the injury;<sup>11</sup> that one who stands in a large crowd assembled in a public street so near a street railway track as to be hit by a passing car is guilty of contributory negligence, although he does not hear the car, where his failure to hear is due to the crowd, and not to negligence of the company;<sup>12</sup> that one who steps down to adjust a plank over an excavation next to a street railway track, without looking for an approaching car, is guilty of such contributory negligence as will preclude recovery for injury from collision with the car;<sup>13</sup> that, where a person walks along a narrow space between two trolley tracks, a place dangerous in itself, and not intended for pedestrians, without looking for a car, to recover a shoe cast by one of his horses, and is struck while stooping to pick up the shoe, he is guilty of contributory negligence;<sup>14</sup> that, where a person voluntarily walks along a street car

(N. Y.) 539, 32 N. Y. Supp. 304.

9. *Thal v. Met. St. Ry. Co.*, 37 Misc. Rep. (N. Y.) 794, 76 N. Y. Supp. 918.

10. *Davies v. People's Ry. Co.*, 159 Mo. 1, 59 S. D. 982; revg. 67 Mo. App. 598.

11. *Warner v. People's St. R. Co.*,

141 Pa. St. 615, 28 W. N. C. 3, 21 Atl. 737, 22 Pittsb. L. J. N. S. 68.

12. *Washington & G. R. Co. v. Wright*, 7 App. D. C. 295, 23 Wash. L. Rep. 844, 28 Chic. Leg. N. 155.

13. *Hafner v. St. Paul City R. Co.*, 73 Minn. 252, 75 N. W. 1048.

14. *Dix v. Ridge Ave. Pass. Ry. Co.*, 15 Pa. Super. Ct. 350.

track to avoid some mud on the safe part of the street, the place being well lighted and it being possible to see a car for some distance in either direction, and is struck by a car, he is guilty of contributory negligence, precluding recovery for injuries sustained.<sup>15</sup> It is negligence for one after dark to deliberately stand between parallel cable street car tracks which are near together, and attempt to get on a car coming on one track, without looking to see whether cars are approaching on the other;<sup>16</sup> but a person who, while standing upon a crosswalk between two lines of tracks with the intention of boarding an approaching car, was struck by one approaching from the opposite direction, is not precluded from recovering because he took an exposed position, where the defendant's negligence in failing to check the speed of the car on its nearing the crossing was the proximate cause of the injury.<sup>17</sup> One who, while standing between the double tracks of a street railway where there is sufficient room to insure her safety from cars passing in either direction, and, being intent on observing a car coming from one direction, steps back in front of another car coming from an opposite direction and only ten or fifteen feet away, without observing it, and is struck and injured, is guilty of contributory negligence and cannot recover.<sup>18</sup> But one on a narrow passageway between tracks, from which passengers board trains, for the purpose of boarding a train then on the track, has the right to assume that he will not be injured by an incoming car on another track, and a slight inattention on his part should not subject him to severe injury by the negligence of a motorman, although his position calls for more than ordinary care; such a person struck by an electric car coming up from behind, because of the narrow passageway between the two trains, does not come within the rule requiring one to look and listen.<sup>19</sup> So, one who

**15.** *Penman v. McKeesport, etc., R. Co.*, (Pa.) 31 Pittsb. L. J. N. S. 264. And see *Atchison, T. & S. F. Ry. Co. v. Schwindt*, 1 St. Ry. Rep. 218, and notes (Kan.) 72 Pac. 573.

**16.** *Miller v. St. Paul City R. Co.*, 42 Minn. 454, 44 N. W. 533.

**17.** *Boentgen v. New York & H. R. Co.*, 36 App. Div. (N. Y.) 460, 55 N. Y. Supp. 847, 5 Am. Neg. Rep. 421; revg. 50 N. Y. Supp. 331.

**18.** *Bailey v. Market St. Cable R. Co.*, 110 Cal. 320, 42 Pac. 914.

**19.** *Conway v. New Orleans, etc.,*

was injured by being struck by an electric car while walking in the only path intended for foot travelers, and in which it was customary for people to walk, near the railroad tracks, was not guilty of contributory negligence, where the night was dark, and he had taken precaution to look back for approaching cars, and when struck was two or three hundred feet from where he last looked back, and the car was running from twenty to twenty-five miles an hour at the time of the accident, with only a kerosene lamp for a headlight.<sup>20</sup> A person standing in the street near a street railroad track, because of a temporary blockade of the street by wagons, is, as matter of law, not guilty of contributory negligence, if struck by a car on such track.<sup>21</sup> Where it is shown that the deceased was not on the track intentionally, but was there involuntarily and in a helpless condition, then he is not chargeable with contributory negligence.<sup>22</sup> A finding of negligence on the part of a street railway company, and no negligence on the part of one knocked down by a car driven against him without slackening speed, is justified by proof that he was in full view of the driver for hundreds of feet, as he stood with his back to the car in a narrow space, flagging an approaching train at a crossing.<sup>23</sup>

R. Co., 51 La. Ann. 146, 24 So. 780, 5 Am. Neg. Rep. 354.

**20.** *Carlson v. Lynn & B. R. Co.*, 172 Mass. 388, 52 N. E. 520, 5 Am. Neg. Rep. 365.

**21.** *Hernandez v. Met. St. Ry. Co.*, 74 N. Y. Supp. 898, 36 Misc. Rep. (N. Y.) 793; revg. 72 N. Y. Supp. 1107, 35 Misc. Rep. (N. Y.) 853.

**22.** *Electric Ry., L. & P. Co. v. Brickell*, (Kan.) 4 St. Ry. Rep. 324, 88 Pac. 297.

**23.** *D'Oro v. Atlantic Ave. R. Co.*, 13 N. Y. Supp. 789, 37 St. Rep. (N. Y.) 411. It has been held not negligence *per se* in a child twelve and a half years old to walk on the track a short distance at a time when the car was not due, and that the alleged negligence of the driver in running over

him was a question for the jury, where it appeared that he was driving very fast, and, although he saw the child, and gave warning of his approach by shouting several times, he did not slacken the speed of his car, but relied upon the child hearing him and leaving the track. *Shea v. Potrero, etc., R. Co.*, 44 Cal. 414.

**In an action for personal injuries to a minor** in consequence of being run over by a street car, in which there is evidence that he walked upon the track a considerable distance by the side of a noisy ice cart, but that he had no reason to expect a car at that particular time, the car which ran over him being late and another not yet due, the question of the boy's contributory

Where the plaintiff was injured by being struck by an electric car while walking upon a bridge belonging to the defendant, and it appeared that before going from the pathway to the bridge he could see the car standing there, and, if he had looked, he could not have failed to see the motorman getting ready to start; he knew the character of the bridge and that if the car started and overtook him before he crossed, he could not avoid the collision; the car started soon after the plaintiff began crossing the bridge and came in contact with him; it was held that his failure to look for the approaching car before attempting to cross the bridge was negligence.<sup>24</sup> But where plaintiff was not warned that the general public was not allowed on a trestle and the evidence warranted a finding that the employees of the defendant did not exercise ordinary care to avoid injuring the plaintiff after her presence and peril were discovered by them, it was held not error to refuse a new trial on the grounds that a verdict for the plaintiff was contrary to law and the evidence.<sup>25</sup>

#### § 425. Contributory negligence of workmen on the public streets.

— Municipal and other employees whose duties in the public service require them to work upon the streets on or near the tracks of street railroads are required to use reasonable care to avoid being injured or run over by passing cars, but they are not bound to exercise the same degree of care in looking and listening for the approach of cars as ordinary pedestrians are. They need only exercise that degree of care which an ordinary prudent man would exercise under like circumstances.<sup>26</sup> The rule in New York and

negligence was held to be one for the jury. *Howland v. Union St. R. Co.*, 150 Mass. 86, 22 N. E. 434.

24. *Judge v. Elkins*, 1 St. Ry. Rep. 300, 183 Mass. 229, 66 N. E. 703.

25. *Atlanta Ry. & Power Co. v. Monk*, 1 St. Ry. Rep. 57, 45 S. Car. 494.

26. *O'Connor v. Union Ry. Co.*, 67 App. Div. (N. Y.) 99, 73 N. Y. Supp. 606, a street sweeper working on

street car tracks is not guilty of contributory negligence in not looking back of him all the time for a car; *Smith v. Bailey*, 14 App. Div. (N. Y.) 283, 43 N. Y. Supp. 856; *Dipaolo v. Third Ave. R. Co.*, 55 App. Div. (N. Y.) 566, 67 N. Y. Supp. 421, holding, in the case of a street sweeper injured while working between the rails of defendant's track, that the rule as to looking and listening does

some other States, where it is necessary to show freedom from contributory negligence, is that plaintiff, in order to recover, is only bound to show that he was free from negligence which contributed to the injury, and to charge him with contributory negligence it must have been proximate and not remote.<sup>27</sup> An employee of a city engaged in laying water pipes under the tracks of a street railway is lawfully in the trench for that purpose, since the consent of the city to the occupancy of a portion of the street by the railroad company does not destroy its right to repair or construct public works.<sup>28</sup> But, assuming that a plaintiff had the same right as a laborer working in the street for the public had and was not bound to exercise the same degree of care required of the ordinary pedestrian, it is held that he was bound to use reasonable care, and having failed to do so, he cannot recover.<sup>29</sup> It is not contributory negligence *per se* for a workman to go into a hole where there is machinery for operating a cable, relying on the trackmaster's assurance that he would see the engineer and that the cable would not start while he was there, or for a person in the employ of a contractor doing work under a cable road to do so, but the company is not liable, though the contractor may be, in the latter event, where the workman becoming annoyed by the cable on the car stopping over him grasped the rail and the car started up cut off his fingers.<sup>30</sup> In the latter instance the proximate cause of the injury was the placing of his hand on the rail by the workman while the car was passing over that particular place, which was a

not apply to employees whose duties require them to work on such tracks; *Owens v. People's Pass. R. Co.*, 155 Pa. St. 334, 26 Atl. 748, 32 W. N. C. 313, the rules applicable to persons crossing steam railroads or street railroads do not apply to a city employee engaged in laying water pipes in a trench under a track of a street railroad.

**27.** *Brick v. Met. St. Ry. Co.*, 35 Misc. Rep. (N. Y.) 135, 71 N. Y. Supp. 314.

**28.** *Owens v. People's Pass. R. Co.*, 155 Pa. St. 334, 26 Atl. 748, 32 W. N. C. 313.

**29.** *Volosko v. Interurban St. Ry. Co.*, 190 N. Y. 206, 6 St. Ry. Rep. 249, 82 N. E. 1090.

**30.** *Mullane v. Houston St., etc., R. Co.*, 21 Misc. Rep. (N. Y.) 10, 46 N. Y. Supp. 957; *affg* 20 Misc. Rep. (N. Y.) 434, 45 N. Y. Supp. 1039; *Floetl v. Third Ave. R. Co.*, 10 App. Div. (N. Y.) 308, 41 N. Y. Supp. 792, 75 St. Rep. (N. Y.) 1191.

known and obvious danger, and he is held to have voluntarily assumed the risk.<sup>31</sup> A workman who fails to exercise his faculties of seeing and hearing to note the approach of a cable or electric car, and to exercise ordinary care and prudence to get out of its way, when by so doing accident could be avoided, is guilty of contributory negligence, as matter of law, as, for example, where a street sweeper, who is struck by an electric car which approached him in plain sight for nearly two thousand feet, failed to look for a car when he was deaf and could not hear the signals.<sup>32</sup> And where an employee of a water company was engaged in work on the street near street car tracks at night, of which fact the company had no notice, and while kneeling close to the track was struck by a car, it was held that as there was no obstruction to his vision or his hearing, nothing to prevent his use of these senses for his own protection, and nothing in the nature of what he was doing to prevent their nonuse, his failure to use his senses to apprise him of a danger of which he was fully aware, was negligence that directly contributed to his injury.<sup>33</sup> So, a street sweeper working on a crosswalk over which street cars run, who, when warned of an approaching car by a policeman, steps backward without looking, so that he is struck by a car on another track, is precluded by his own want of care from recovering damages against the company.<sup>34</sup> Where a person engaged in patching the flooring of a bridge stooped down near the track, where he was struck by the running-board of the car, and it appeared that he knew the danger of being too near the track, as it appeared that he had been struck by a car near the same place a few years before, he was held not to be in exercise of due care.<sup>35</sup> One working near

**31.** *Nolan v. Met. St. Ry. Co.*, 65 App. Div. (N. Y.) 184, 72 N. Y. Supp. 501. See also cases cited under section 407, *ante*.

**32.** *McKeown v. Cincinnati St. R. Co.*, 2 Ohio Leg. N. 388; *Lyons v. Bay Cities Consol. R. Co.*, 115 Mich. 114, 4 Detroit Leg. N. 797, 73 N. W. 139.

**33.** *Bushay v. Ocean City Elec. R. Co.*, 74 N. J. L. 30, 5 St. Ry. Rep. 708, 64 Atl. 968.

**34.** *Daly v. Detroit Citizens' St. R. Co.*, 105 Mich. 193, 2 Detroit Leg. N. 61, 63 N. W. 73.

**35.** *Quinn v. Boston Elev. Ry. Co.*, 188 Mass. 473, 4 St. Ry. Rep. 468, 74 N. E. 687.

the end of a plank, one end of which he had allowed to be placed so near a street railway track that a car came in contact therewith and threw it against his ankle, has been held guilty of contributory negligence, where his hearing was unimpaired and he did not hear the approach of the car, even though the motorman did not give any signal of its approach;<sup>36</sup> but the foreman of a gang of men engaged in opening a drain between the tracks of a trolley railroad was held not guilty of contributory negligence, as a matter of law, in attempting to remove a plank, one end of which was on the track, while a car was approaching, especially where the car had stopped some distance away and he did not know that it was moving toward him.<sup>37</sup> Where employees of the city are required to be on or near the tracks in the prosecution of their work of laying or repairing pavements and so forth, the rule requiring the ordinary pedestrian to look and listen for approaching cars is not applicable in all circumstances, and the question of contributory negligence may be more properly one for the jury to determine.<sup>38</sup> So, where there is a conflict of evidence as to whether there were street noises which deadened the sound of an approaching car, the

**36.** *Eddy v. Cedar Rapids, etc., R. Co.*, 98 Iowa 626, 67 N. W. 676.

**37.** *Morrissey v. West Chester Elec. R. Co.*, 18 App. Div. (N. Y.) 67, 45 N. Y. Supp. 444.

**38.** *Burns v. Second Ave. R. Co.*, 21 App. Div. (N. Y.) 521, 48 N. Y. Supp. 523, where a workman engaged in laying gas mains in an open trench under a horse car track, while attempting to avoid a horse which stepped into the trench, was killed by a car from which the horse was detached and which was allowed to go over the trench by its own momentum; *Bengivenga v. Brooklyn Heights R. Co.*, 48 App. Div. (N. Y.) 515, 62 N. Y. Supp. 912, where one carrying hot asphalt on a shovel and placing it between the tracks stood beside the track while a passing car went by,

and then stepped between the tracks to deposit the asphalt; *Weingarten v. Met. St. Ry. Co.*, 62 App. Div. (N. Y.) 364, 70 N. Y. Supp. 1113, where plaintiff, who was engaged with others in pushing an iron beam, extending from the street to a building being constructed, up out of the way, notified an approaching street car to stop and then turned to his work, and the car passing rapidly struck the beam and injured him; *Anselment v. Daniell*, 4 Misc. Rep. (N. Y.) 144, 53 St. Rep. (N. Y.) 133, 23 N. Y. Supp. 875; *Lewis v. Binghamton R. Co.*, 35 App. Div. (N. Y.) 12, 54 N. Y. Supp. 452; *Laschinger v. St. Paul City Ry. Co.*, 84 Minn. 333, 87 N. W. 836, where city employees were injured while flushing the streets by defendant's cars.

question of contributory negligence is one of fact for the jury.<sup>39</sup> It is for the jury to say whether an employee of a telephone company injured by contact with an iron peg in a telegraph pole, which had become charged by reason of disarrangement of the wires of an electric railway company attached thereto, was guilty of contributory negligence; and the employee has a right to assume that the railway company's wire, not being intended to carry electricity, is not dangerous.<sup>40</sup> An employee of a gas company engaged in laying gas pipes in a trench alongside a street railway track is as much bound to the observance of ordinary care to avoid injury from a street car as an ordinary traveler.<sup>41</sup> A person unlawfully engaged in work upon a street for a telegraph company, which had not obtained a statutory license for locating its wires thereon, has been held in Massachusetts so negligent that he cannot recover for an injury caused by the negligence of a street railroad company.<sup>42</sup>

**§ 426. Contributory negligence of bicyclists.**—A cyclist is bound to look and listen just before crossing street railway tracks, and is guilty of contributory negligence if he fails to do so, and under some circumstances may be negligent in crossing, even though he looks to see if a car is approaching.<sup>43</sup> A person riding

**39.** *Little v. Grand Rapids St. R. Co.*, 78 Mich. 205, 44 N. W. 137.

**40.** *Geutzkow v. Portland St. Ry. Co.*, (Oreg.) 6 St. Ry. Rep. 642, 100 Pac. 614.

**41.** *Young v. Citizens' St. R. Co.*, 148 Ind. 54, 44 N. E. 927, rehearing denied 47 N. E. 142.

**42.** *Banks v. Highland St. R. Co.*, 136 Mass. 485.

**43.** *McCracken v. Consol. Traction Co.*, 201 Pa. St. 378, 50 Atl. 830, where, in a suit against a street railway company for killing a cyclist of mature years crossing its tracks, there was evidence that the car was

going at a high rate of speed; plaintiff's witnesses, including decedent's son, who was riding with him, testified that the car was fifty to seventy-five feet away when decedent attempted to cross; he then had seventeen and one-half feet to go to entirely clear both tracks and place himself outside the running-board of the far side of the car, and was moving from ten to fifteen feet per second; several of plaintiff's witnesses testified that they were afraid the car would strike him, it was held that, even if decedent looked to see if a car was coming, he was negligent in crossing. In *Peltier v. Bradley*, 67

between the rails of an electric street railway upon a bicycle has the duty to look out for and endeavor to avoid danger from the electric cars, and the negligence of a bicycle rider who continued to ride on the track of an electric car up to the very moment when he was struck, when by the slightest care and effort on his part he could have put himself out of danger up to the last moment, is a contributing and efficient cause of the injury, which precludes the conclusion that the negligence in managing the car was later in time, and, therefore, the proximate cause of injury.<sup>44</sup> A bicyclist has the right to ride along the slot of a cable street railroad, though as it is a place of danger, he is bound to exercise corresponding care, but he is entitled to rely upon a signal from a car approaching from behind him.<sup>45</sup> But a person riding a bicycle on an electric railroad track in front of a moving car not twenty feet away is guilty of such contributory negligence as will defeat recovery, and under such circumstances the negligence of both parties, if both are guilty, is held to be concurrent in Ohio.<sup>46</sup> And where a bicyclist was riding upon the track of a street railway when there was ample room outside the track, and a car came up from behind and struck him, it was held that his failure to see or hear the car must have been the result of absolute inattention to his situation and surroundings, and that, as a matter of law, he was guilty of contributory negligence. The court said that in cases of this character the correct rule is that one riding or walking upon the tracks of a street railway company must use reasonable care in the exercise of his faculties of sight and hearing to watch and listen for cars going in either direction. A failure to hear or to

Conn. 42, 34 Atl. 712, it was held that the rider of a bicycle is required to use the same degree of care as the driver of a team of horses hitched to a wagon. Therefore, a bicyclist who attempts to pass another vehicle does so at his peril. *North Chicago St. Ry. Co. v. Cossar*, 1 St. Ry. Rep. 106, 203 Ill. 608, 68 N. E. 88.

**44.** *Everett v. Los Angeles Consol. Elec. R. Co.*, 115 Cal. 105, 43

Pac. 207, 210, 34 L. R. A. 350; *affd.*, 46 Pac. 889.

**45.** *Rooks v. Houston, etc., R. Co.*, 10 App. Div. (N. Y.) 98, 41 N. Y. Supp. 824, 29 Chic. Leg. N. 118. See also *Zolpher v. Camden & Suburban Ry. Co.*, 1 St. Ry. Rep. 549, (N. J.) 55 Atl. 249.

**46.** *Cleveland, P. & E. R. Co. v. Nixon*, 21 Ohio C. C. 736, 12 Ohio C. D. 79.

see a car is not *per se* proof of negligence in all cases. Whether such exercise of the faculties as, under all the circumstances of the case, was reasonable would have averted the injury, is a question of fact. The degree of vigilance to be exercised by the person on the track is to be determined by the jury, and not laid down as a matter of law, whenever the question of contributory negligence is proper to be submitted to the jury at all.<sup>47</sup> A bicyclist who rode onto a street car track in front of a car going in the same direction as he was, and continued on the track for about 140 feet without looking to see where the car was or trying to avoid it, and was run into by the car, was held guilty of contributory negligence.<sup>48</sup> So, where one was riding on his bicycle between the tracks of defendant company and immediately in the rear of a car, and was in full possession of all his faculties and had control of the bicycle, and, in attempting to pass the car, turned to the left across the adjacent track and ran into a car coming in the opposite direction, he was guilty of contributory negligence barring recovery.<sup>49</sup> Where one riding a bicycle so near a street car track as to be in danger from passing cars failed, for a distance of three hundred feet, to look behind him, though he knew that the cars came frequently from that direction; there was nothing to prevent him from riding farther from the track, except a roughness in the asphalt pavement; he was in full possession of his senses, and had control of his bicycle; he was struck by a car running at full speed, which had given no special warning of its approach, but which, had he looked or listened, he could have seen or heard at a distance of three hundred feet; it was not shown what indications he gave that he could not or would not turn aside to avoid the car, it was held that he was guilty of contributory negligence.<sup>50</sup> Where plaintiff was injured by a street car when attempting to cross the track on a bicycle, going at the rate of four to six miles an hour,

**47.** *Hamlin v. Pacific Elec. Ry. Co.*, 150 Cal. 776, 5 St. Ry. Rep. 52, 89 Pac. 1109. *tion Co.*, 190 Pa. St. 198, 42 Atl. 477, 5 Am. Neg. Rep. 717.

**48.** *Bacon v. Consol. Traction Co.*, (Pa. C. P.) 30 Pittsb. L. J. N. S. **49.** *Medcalf v. St. Paul City Ry. Co.*, 82 Minn. 18, 84 N. W. 633.

**50.** *Robards v. Indianapolis St.* 431. See also *Gould v. Union Trac-*

and not looking for the car until he was on the track, although if he had looked he could have seen the car in time to have stopped or turned aside, it was held that he could not recover for negligence of the company in running the car at an excessive rate of speed and not ringing the gong, as his own negligence contributed to the injury.<sup>51</sup> A bicyclist was held guilty of contributory negligence precluding recovery for his death from being struck by a street car which rounded a curve just as he was emerging from behind a car headed in the opposite direction which he had been following, and which had stopped for the signal before entering upon the curve, where he was an expert rider, and was familiar with the curve and the streets and the danger incident thereto.<sup>52</sup> And where a portion of a street was being repaved and reconstructed by a street railway company and the city jointly, and there were barriers set up in the street indicating that such portion was closed to public travel, and a bicyclist in endeavoring to pass over it was injured, it was held that the bicyclist was not in the exercise of due care, and that neither the company nor the city was liable.<sup>53</sup> A bicyclist in the full possession of his faculties, who, while riding between double street car tracks, suddenly turned in front of a car of whose approach he was warned by the gong, and by which he was killed, was held guilty of contributory negligence so gross as to amount to recklessness.<sup>54</sup> A wheelman riding between the tracks of a street railway and proceeding in the same direction as the cars does not enjoy such right of way as imposes upon the driver of a cart approaching in the opposite direction the duty of leaving the track to give him a free and unobstructed passage, and, if his persisting in remaining between the tracks results in a collision he is guilty of contributory negligence which prevents his recovery, notwithstanding a city ordinance which in

Ry. Co., 32 Ind. App. 297, 66 N. E. 66, 67 N. E. 953.

51. *Bennett v. Detroit Citizens' St. Ry. Co.*, 123 Mich. 692, 82 N. W. 518.

52. *Cardonner v. Met. St. Ry. Co.*, 26 App. Div. (N. Y.) 8, 49 N. Y. Supp. 527.

53. *McFarlane v. Boston Elev. Ry. Co.*, 194 Mass. 183, 5 St. Ry. Rep. 455, 80 N. E. 447.

54. *Gagne v. Minneapolis St. R. Co.*, 77 Minn. 171, 79 N. W. 671.

ordinary cases gives vehicles the right of way on the tracks of street railroads when going in the direction which the cars ordinarily run.<sup>55</sup> On the question of the contributory negligence of one who, riding on a bicycle close behind a west-bound car, turned suddenly at a street crossing in front of an east-bound car, which he could not see until he was on the track, the fact that he was less than eleven years old is to be considered.<sup>56</sup> Where a railroad company was required by charter "to construct and keep in repair good and sufficient bridges over and under the said railway, where any public or other road shall cross the same, so that the passage of carriages, horses, and cattle across the said railway shall not be impeded thereby;" and, at the grade crossing of a turnpike by the single-track railroad of such company, the bridging consisted of planks four inches thick, laid parallel with the rails; the crossing was diagonal, and was dangerous, because the view of the trains was not clear; a bicyclist riding over the track was thrown from her wheel and injured by reason of a gap in the bridging just inside the farther rail in her course, caused by the removal of six feet in length of one of such planks, it was held that, considering the character of the crossing and the duty of travelers to look for approaching trains, the bicyclist's failure to notice such gap in the bridging was not indisputably negligent.<sup>57</sup> And where a bicyclist

**55.** *Taylor v. Union Traction Co.*, 184 Pa. St. 465, 6 Pa. Dist. Rep. 365, 40 Atl. 159.

**56.** *Roberts v. Spokane St. R. Co.*, 23 Wash. 325, 63 Pac. 506.

**57.** *Sonn v. Erie R. Co.*, 66 N. J. L. 428, 49 Atl. 458. In a recent case the defendant operated two tracks in the street where the accident occurred. One of such tracks was used for south-bound cars and the other for north-bound cars. The plaintiff's testator was riding a bicycle at about 11:40 in the evening northward between the tracks of the defendant. The street on the east side of the outermost rails of the tracks was im-

passable for a bicyclist because of snow, ice, and slush. It appeared that the motorman saw the deceased riding between the tracks and when within from twenty-five to thirty-five feet rang his bell, but did not slacken the speed of his car; it further appeared that the deceased believed the car which was approaching him was upon the easternmost track, and that he turned to go from the space between the tracks upon the westernmost track in order that he might be beyond all danger of being struck by the car, and was there run upon and killed. It was held that whether the motorman was in the exercise of or-

in crossing street car tracks at night was struck by a car which had no headlight, and was running at a rapid rate of speed, the court declared that it could not say, as a matter of law, that ordinary care required him to dismount and look intently for an approaching car to relieve him from the charge of contributory negligence.<sup>58</sup>

§ 427. **Contributory negligence of drivers and occupants of hose carts, ambulances, etc.** — Although hose carts, fire engines, police patrol wagons, or ambulances may have the right of way by reason of a city ordinance or the provisions of the charter or franchise of a street railway company, the drivers of such vehicles must exercise reasonable care and prudence in driving across street railroad tracks.<sup>59</sup> The driver of a hook and ladder truck is, however,

dinary care, or whether the plaintiff's testator was guilty of contributory negligence were questions of fact for the jury. *North Chicago St. Ry. Co. v. Irwin*, 202 Ill. 345, 66 N. E. 1077, 1 St. Ry. Rep. 71, and notes.

**The plaintiff was riding a bicycle along the tracks** of the defendant street railroad company, at times in front and again in the rear of a car being operated upon such tracks. The car stopped at a usual stopping place to allow passengers to alight, and the conductor left the car to assist a lady passenger, and just as he stepped upon the ground the plaintiff, who was riding near the car, and a few feet to the rear of the platform, ran against him with the bicycle. He was knocked down and she was thrown from her bicycle and injured. The plaintiff's view of the street and of the car was unobstructed, the pavement was in good repair, and the car was standing still at the time of the collision. The court held that the failure of the plaintiff to turn out a sufficient dis-

tance from the car to permit her to pass in safety was the proximate cause of the injury, and that she was, therefore, guilty of contributory negligence. *North Chicago St. Ry. Co. v. Cossar*, 1 St. Ry. Rep. 106, 203 Ill. 608, 68 N. E. 88.

**58.** *Indianapolis St. Ry. Co. v. Taylor*, 39 Ind. App. 592, 5 St. Ry. Rep. 270, 80 N. E. 436.

**59.** *Birmingham Ry. & Elec. Co. v. Baker*, 126 Ala. 135, 28 So. 87, where plaintiff, a fireman, was riding on a hose cart driven by the chief driver; the horses were being driven as fast as they could run, and, while crossing defendant's tracks, collided with a car standing thereon, and plaintiff was injured; there was a car track on the street on which the hose cart was being driven, and crossing defendant's tracks; there was a space of about eight feet between such track and defendant's car; no effort was made to check the speed of the hose cart as it approached defendant's track, it was held that the manner of driving the hose care across

bound to respond to the alarm of fire with the greatest practical speed and is only bound to drive with that care which a prudent person would exercise under like circumstances.<sup>60</sup> While a driver may not be negligent, as a matter of law, it may be a question for the jury whether, under all the circumstances of the particular case, he was negligent as matter of fact.<sup>61</sup> A salvage wagon re-

the track was negligent; *Decker v. Brooklyn Heights R. Co.*, 64 App. Div. (N. Y.) 434, 72 N. Y. Supp. 229, where plaintiff, a policeman, was in charge of a patrol wagon driven by another policeman in answer to a call, the horses going at a brisk trot, and the bell ringing; the street on which they were driving was down grade; when reaching the curb line of a certain intersecting street, the driver saw a street car approaching between 30 and 100 feet away, whereupon he whipped the horses, and attempted to cross the track ahead of the car, but the car struck the hind wheel of the wagon, and plaintiff was thrown out and injured — it was held that the driver exercised the degree of care which a reasonably prudent man would have used under such circumstances.

The driver of a fire department fuel wagon should exercise ordinary care on the way to a fire on approaching a street car crossing to look and listen before driving on the track. *Guiney v. Southern Electric Ry. Co.*, 167 Mo. 595, 67 S. W. 296.

**60.** *City of New York v. Metropolitan St. Ry. Co.*, 2 St. Ry. Rep. 781, 90 App. Div. 66, 85 N. Y. Supp. 693.

**61.** *Quinn v. Dubuque St. Ry. Co.*, 1 St. Ry. Rep. 198 (Iowa) 94 N. W. 476, where, while a hook and ladder truck, weighing 9,000 pounds, and carrying ten or twelve men, was cross-

ing a street, it was struck by a car going south on the cross street, and plaintiff was injured; a seven-story building on the corner obstructed the driver's view up the cross street on approaching it; the distance from his seat to the horses' heads was over fourteen feet, and he testified that he did not notice the car coming from the north fifty or more feet away, though he both looked and listened until the horses were about to go on the track, and that he urged them, but could not get across in time to avoid the collision — it was held that whether the driver was at fault was for the jury.

The facts examined in an action brought against a street railway company by a fireman who was injured by a collision with a trolley pole while climbing into a fire patrol wagon, by means of a step on the side thereof, for the purpose of going to a fire, as the wagon was turning from the driveway of the fire patrol house into the street, such pole being just back of the street curb line and less than a foot away from the edge of the opening cut through the curb for the driveway, although several feet from the paved part of the driveway, and held that it was error for the trial court to hold, as matter of law, that the defendant was not guilty of any negligence in locating the pole as it did, and that the plaintiff was guilty of contributory negligence in

sponding to an alarm of fire having the right of way in the street, the driver, in driving from ten to fifteen miles an hour, was not guilty of such contributory negligence as will preclude him from recovering for an injury resulting from a collision with a street car.<sup>62</sup> Where a fireman, riding on a hook and ladder truck to a fire, sees, when the truck is about half way across the tracks of a street railroad, that there will be a collision between the truck and the car, and jumps, but is killed by the truck being precipitated upon him, the jury is warranted in finding no contributory negligence, as the decedent had no control over the driver and the driver none over the decedent.<sup>63</sup> And in an action by a driver of a hose cart to recover for personal injuries, where it appeared that when responding to an alarm in approaching an intersecting street on which there was a street car line, having his team under control and the street car having stopped just before crossing, he started to cross ahead of it, when the car suddenly started, compelling him to turn to the left to avoid a collision, and the cart thereby struck a lamp post, resulting in injuries to himself, it was held that the evidence did not show undisputably that the plaintiff was guilty of contributory negligence.<sup>64</sup> A driver of a fire truck on his way to a fire is bound upon approaching a street car line on an intersecting street to have his horses under such control as to permit of stopping in time to avoid a collision with any car that may be approaching, and his failure in that respect precludes recovery for his death from collision between the truck and such a car, if it contributed thereto.<sup>65</sup> And where a person driving a mail wagon was struck by the rear end of a car as it rounded a curve, and he could have avoided the accident by driving nearer

endeavoring to get into the wagon as he did, and to dismiss the complaint upon such grounds, since both of these questions were questions of fact for the jury to determine. *Lambert v. Westchester Elec. R. Co.*, 191 N. Y. 248, 6 St. Ry. Rep. 537, 83 N. E. 977.

**62.** *Flynn v. Louisville Ry. Co.*, 23 Ky. L. Rep. 57, 62 S. W. 490.

**63.** *Geary v. Met. St. Ry. Co.*, 73

App. Div. (N. Y.) 441, 77 N. Y. Supp. 54, 84 App. Div. (N. Y.) 514, 82 N. Y. Supp. 1016.

**64.** *O'Neill v. St. Louis Transit Co.*, 3 St. Ry. Rep. 580, 108 Mo. App. 453, 83 S. W. 990.

**65.** *Garrity v. Detroit Citizens' St. R. Co.*, 112 Mich. 369, 4 Detroit Leg. N. 46, 70 N. W. 1018, 37 L. R. A. 529, 2 Chic. L. J. Wkly. 277.

the curb, but did not do so, a judgment in his favor was reversed.<sup>66</sup> Knowledge by the driver of a hose cart that a street car company had promised to repair the track at a specified place is a circumstance to be considered by the jury in determining whether he used proper care in attempting to cross; but his reliance on such promise cannot defeat the defense of contributory negligence, if he failed to exercise due care in the endeavor to cross the obstruction.<sup>67</sup> Where a fireman, not having time to fully equip himself before the wagon started, placed his leg between the rounds of the ladders to support him while he adjusted his belt, when the wagon collided with a street car and caused the ladders to shift together and cut off his leg, his negligence was held to be a question for the jury.<sup>68</sup> It is not negligence *per se* for the driver of a police patrol wagon to drive along and upon the tracks of a street railway.<sup>69</sup> The negligence of the driver of a hose cart cannot be imputed to a fireman riding on the cart, or to an employee of the fire department who is injured while engaged in their common employment, when such person is free from personal negligence, and has no control over the driver, and has not been guilty of any want of care in his selection.<sup>70</sup> So, although it is the duty of a fireman riding on a truck to look out for his own safety in some measure, it is not in-

**66.** *Waters v. United Traction Co.*, 114 App. Div. (N. Y.) 275, 5 St. Ry. Rep. 773, 99 N. Y. Supp. 763.

**67.** *Houston City St. R. Co. v. Richart*, 87 Tex. 539, 29 S. W. 1040; revg. 27 S. W. 918; *Birmingham Ry. & Elec. Co. v. Baker*, 132 Ala. 507, 31 So. 618, so held where it was claimed that the fireman's negligence in attempting to put on his coat on a moving cart contributed to the injury.

**68.** *Magee v. West End St. R. Co.*, 151 Mass. 240, 23 N. E. 1102.

**69.** *Swain v. Fourteenth St. R. Co.*, 93 Cal. 179, 28 Pac. 829.

**70.** *Houston City St. R. Co. v. Richart*, *supra*; *Elyton Land Co. v. Mingea*, 88 Ala. 434, 7 So. 666; *Bir-*

*mingham Ry. & Elec. Co. v. Baker*, 132 Ala. 507, 31 So. 618.

An action was brought to recover for injuries to a fireman riding on a hose wagon driven by another person, said wagon colliding with a street car. It appeared that the fireman was near the rear end of the hose wagon standing on the running-board and holding on to a rail provided for that purpose, while the driver was on the front seat guiding the horses. The fireman has nothing to do with the selection of the driver and had no control over his acts. It was held that the driver and the fireman were not engaged in a common enterprise and that the negligence of the former could not be imputed to the latter.

cumbent on him to keep the vigilant watch for cars which is expected of the driver, and the negligence of the driver will not be imputed to him if he did all in his power to save himself.<sup>71</sup> Whether a person is negligent in not warning a driver with whom he is riding as to an improper rate of speed, or calling his attention to a defect in the highway, is a question for the jury.<sup>72</sup> Where, while crossing a street, a hook and ladder truck was struck by a street car coming from the north; plaintiff, a fireman, was riding on the footboard on the north side of the truck, and, as customary, looking across it; other employees were on the opposite side, looking to the north; there was evidence that the gong on the car was not rung, and the first warning the plaintiff had of the car's approach was the signal of a woman on the sidewalk; he immediately jumped, but was caught by the car and injured — it was held that plaintiff was not negligent, as a matter of law, in not turning around and observing the car in time to leave the truck in safety.<sup>73</sup>

**§ 428. Contributory negligence of children.** — It is a rule of law now almost universally held that the degree of care, prudence, and discretion required from children, who are *sui juris*, is not the same as is required of adults, but is only such as ought reasonably to be expected of persons of their age, intelligence, capacity, and experience.<sup>74</sup> The courts have held, as a general rule, that chil-

McBride v. Des Moines City Ry. Co., 134 Iowa 398, 109 N. W. 618.

The negligence of the driver of a fire engine is not imputable to the engineer who, in the performance of his duty, was riding on the rear end of the engine when it collided with a street car. McKernan v. Detroit Citizens' St. Ry. Co., 138 Mich. 519, 101 N. W. 812.

**71.** Burleigh v. St. Louis Transit Co., 124 Mo. App. 724, 102 S. W. 621.

**72.** Elyton Land Co. v. Mingea, (Ala.), *supra*. *Contra*, Smith v. Union Ry. Co., 61 Mo. 588.

**73.** Quinn v. Dubuque St. Ry. Co., 1 St. Ry. Rep. 198, (Iowa) 94 N. W. 476.

**74.** Casey v. Boston Elev. Ry. Co., 197 Mass. 440, 6 St. Ry. Rep. 733, 83 N. E. 867; Stackpole v. Boston Elev. Ry. Co., 193 Mass. 563, 79 N. E. 740; Citizens' St. R. Co. v. Hamer, 29 Ind. App. 426, 62 N. E. 658, 63 N. E. 778; Mallard v. Ninth Ave. R. Co., 7 N. Y. Supp. 666, 27 St. Rep. (N. Y.) 801, a child of nine or ten years was not guilty of contributory negligence, if she exercised such care as might reasonably be expected from a child

dren under five years of age are *non sui juris* and cannot be guilty of contributory negligence, as a matter of law.<sup>75</sup> And where a boy seven years of age stopped on defendant's track for the purpose of removing a piece of glass from his foot, and while doing so was struck and injured, the court declared that while such conduct

of her years; *Block v. Harlem, etc., R. Co.*, 9 N. Y. Supp. 164, 28 St. Rep. (N. Y.) 495; *McCarthy v. Cass Ave., etc., R. Co.*, 92 Mo. 536; *Philadelphia, etc., R. Co. v. Hassard*, 75 Pa. St. 367; *Coller v. Frankford, etc., R. Co.*, (Pa.) 9 W. N. C. 477; *Maher v. Central Park, etc., R. Co.*, 67 N. Y. 52, and other New York cases cited under this section; *Ridenhour v. Kansas, etc., R. Co.*, 102 Mo. 270; *Chicago City R. Co. v. Wilcox*, (Ill.) 24 N. E. 419; *Erie City, etc., R. Co. v. Schuester*, 113 Pa. St. 413, 6 Atl. 269; *Mowrey v. Central City R. Co.*, 66 Barb. (N. Y.) 43; *Louisville R. Co. v. Phillips*, 22 Ky. L. Rep. 842, 58 S. W. 995, holding that where a girl twelve years old was struck by a car at a public crossing, it was sufficient to instruct the jury that it was her duty to exercise such caution as may be reasonably expected of one of her age under the circumstances.

75. *Ihl v. Forty-Second St., etc., R. Co.*, 47 N. Y. 317, 7 Am. Rep. 450, "the child was only three years and two months old, and clearly within the adjudged cases in which infants have been held not *sui juris*, or responsible for their own conduct; *Neun v. Rochester Ry. Co.*, 165 N. Y. 146, 58 N. E. 876, holding that where a child, for causing whose death an action is brought, was *non sui juris* at the time of the accident, its negligence cannot be considered in determining the right to recover, but in such case the negligence of the child's

parents is material; *Prendergast v. New York Cent., etc., R. Co.*, 58 N. Y. 652, an infant of two years of age is not capable of negligence; *Frick v. St. Louis, etc., R. Co.*, 75 Mo. 595, 8 Am. & Eng. R. Cas. 280; *Schmidt v. Milwaukee, etc., R. Co.*, 23 Wis. 186; *Wright v. Malden, etc., R. Co.*, 4 Allen (Mass.) 283; *Toledo, etc., R. Co. v. Grable*, 88 Ill. 441; *Farris v. Cass Ave., etc., R. Co.*, 80 Mo. 325, where a child a little over a year old escaped from his mother's control and crawled upon a street car track. *Baltimore City P. R. Co. v. McDonnell*, 43 Md. 534, where a child two years old was run down by a street car; *Giraldo v. Coney Island, etc., R. Co.*, 16 N. Y. Supp. 774, where a child of two and a half years was run down by a street car; *Mangam v. Brooklyn R. Co.*, 38 N. Y. 455, 36 Barb. (N. Y.) 130, of a child between three and four years of age; *Pittsburgh, etc., R. Co. v. Caldwell*, 74 Pa. St. 421, where a child of five years was alighting from the front platform; *Westfield v. Levis*, 43 La. Ann. 63, 9 So. 52, a child of five years; *Government St. R. Co. v. Hanlon*, holding that, although the injured child was only three and a half years of age, "it would seem that a child under the age of seven years should be absolutely exempt from the operation of the principle," that one guilty of contributory negligence cannot recover. The weight of authority, however, is as stated in the text.

in an adult would have been in the highest degree negligent, that plaintiff being a child of only seven years of age was expected in law to exercise not the degree of care required of more mature persons, but that to be reasonably anticipated in a child of his years.<sup>76</sup> It has been quite generally held also that infants over twelve years of age are presumed, as matter of law, to be *sui juris* as to their responsibility for contributory negligence, and to have sufficient capacity to apprehend, and sufficient prudence and foresight to avoid danger, and this presumption prevails, in the absence of any evidence showing the lack of such capacity.<sup>77</sup> The law does not excuse a boy of eleven and a half years of age for failure to look for the approach of a car when he is about to enter upon a track laid for cars, and on which they, to his knowledge, run with more or less frequency.<sup>78</sup> And where a child of ten years, just before stepping off the curbstone, looked and saw defendant's car approaching and about eighty feet distant from her, and instead of quickening her pace or waiting for the car to pass, she walked across the street in front of the approaching car, without pausing or hurrying, and was run over by it, she was held guilty of contributory negligence as a matter of law.<sup>79</sup> As to children between those ages the courts have usually held the question whether the child was *sui juris* to be one of fact for the jury to determine, and not a question of law, unless the child was unusually intelligent, or the situation was such that a child of ordinary intelligence

**76.** *Butler v. Metropolitan St. Ry. Co.*, 117 Mo. App. 354, 5 St. Ry. Rep. 603, 93 S. W. 877.

**77.** *Tucker v. New York Cent., etc., R. Co.*, 124 N. Y. 308, 26 N. E. 916; *Manahan v. Steinway, etc., R. Co.*, 125 N. Y. 760, 26 N. E. 736, holding that a boy twelve years old presumptively has sufficient discretion to avoid a collision with a horse car while crossing a street; *St. Clair St. Ry. Co. v. Eadie*, 43 Ohio St. 91, 54 Am. Rep. 144, as to a boy sixteen years of age; *Nagle v. Alleghany Val. R. Co.*, 88 Pa. St. 35, 43 Alb. L.

J. 318, as to a boy fourteen years old, who was run down while attempting to cross in front of a train; *Hogan v. Central Park, etc., R. Co.*, 124 N. Y. 647, 26 N. E. 950, as to a boy twelve years of age, who is stealing a ride and heedlessly jumps off in front of a car which he might have seen approaching.

**78.** *Deschner v. St. Louis & M. R. Co.*, 200 Mo. 310, 5 St. Ry. Rep. 549, 98 S. W. 737.

**79.** *Holian v. Boston Elev. Ry. Co.*, 194 Mass. 74, 5 St. Ry. Rep. 406, 80 N. E. 1.

must of necessity realize his danger. For example, it has been held that a child seven years of age is not, as matter of law, *sui juris*, so as to be chargeable with negligence. In the court's opinion it is said: "From the nature of the case it is impossible to prescribe a fixed period when a child becomes *sui juris*. Some children reach the period earlier than others. It depends upon many things, such as natural capacity, physical conditions, training, habits of life, and surroundings. These and other circumstances may enter into the question. It becomes, therefore, a question of fact for the jury, where the inquiry is material, unless the child is of so very tender years that the court can safely decide the fact."<sup>80</sup> In another recent case the plaintiff, while attempting to cross a crowded city street diagonally in front of a moving street car, was struck by it. The car had been proceeding very slowly behind a covered wagon, which had just before the accident

**80.** *Stone v. Dry Dock, etc.*, 'R. Co., 115 N. Y. 104, 23 St. Rep. (N. Y.) 551, 21 N. E. 712; revg. 46 Hun (N. Y.) 184, holding that whether the act of a child of seven years in attempting to cross a street, notwithstanding the approach of a car fifty feet or more away, and the speed of which was suddenly increased, involved the exercise of such care as might reasonably be expected under the circumstances from a child of her age, was a question for the jury; *Gumby v. Met. St. Ry. Co.*, 171 N. Y. 635, 63 N. E. 1117, 65 App. Div. (N. Y.) 38, 72 N. Y. Supp. 551, holding the question of negligence to be for the jury in a case where an infant five years old was injured by being struck by a horse attached to defendant's car, as he was following an older boy across the track, and had already crossed one track, after the car upon it had passed by; *Weitzman v. Nassau Elec. R. Co.*, 33 App. Div. (N. Y.) 585, 53 N. Y. Supp. 905,

holding that whether a child five years old, when in charge of her adult sister, permitted to cross the street alone, but in sight of her sister, was chargeable with contributory negligence, presented a question for the jury as to the exercise of reasonable care; *Sullivan v. Union Ry. Co.*, 81 App. Div. (N. Y.) 596, 81 N. Y. Supp. 449, holding that whether a child seven years and eight months old, who, running after boys who had his cap, followed toward a street car track, without looking for a car, and was struck by a car, was guilty of contributory negligence is a question for the jury; *McDermott v. Boston Elev. Ry. Co.*, 1 St. Ry. Rep. 325, and notes, 184 Mass. 126, 68 N. E. 34, whether a child is of sufficient age and intelligence to be allowed to attend the public schools in the ordinary way, unaccompanied, and also the degree of foresight required of a child under such circumstances are to be determined as questions of fact.

turned to the right; and the motorman, while continuing an altercation with its driver, and looking to the right, suddenly increased the speed of the car, which shot forward and struck plaintiff. The court held that whether the plaintiff might not have crossed the track in safety, in the exercise of such care as was reasonably to be expected of one of his age, was a question for the jury. The court, in its opinion, said: "In a principal avenue of a large city where the traffic is enormous, it is oftentimes necessary for the wayfarer to cross in front of moving cars, and it usually depends upon the surrounding circumstances of each case whether the particular act of crossing was negligent or not, and where the car is suddenly sent ahead with unexpected and dangerous velocity, it is a question for the jury whether even the mature judgment of an adult might not fail to save him in such an emergency," and it stated the rule, as maintained by many authorities, to be that a child, eight years of age, is not to be judged by the standard of intelligence and judgment applied to an adult in full possession of his faculties, and further held that, even if the contributory negligence of a child in crossing in front of an approaching car be conceded, it is for the jury to say whether the defendant might, by the exercise of reasonable care and prudence, have avoided the consequences thereof.<sup>81</sup> The court in the last-mentioned case also stated that it seems that the presumption of law is that a child eight years of age is not *sui juris*, and the burden of establishing that fact rests upon the defendant, and cited in support of the proposition another case wherein the same court said: "The provision of the Penal Code imposing upon the prosecution the burden of showing intelligence sufficient to create responsibility for crime until the age of twelve years, at which time the presumption of incapacity ceases, suggests an age to which the courts can with safety limit the presumption of incapacity on the part of an infant

81. *Costello v. Third Ave. R. Co.*, 248; *Byrne v. Same*, 83 N. Y. 621; 161 N. Y. 317, 55 N. E. 897; *revd.* *Dowling v. Same*, 90 N. Y. 671; *Moe-*  
 26 App. Div. (N. Y.) 48, 49 N. Y. *bus v. Herrman*, 108 N. Y. 353, 15 N.  
 Supp. 868, and citing *McGovern v.* E. 415; *Stone v. Dry Dock, etc., R.*  
*New York Cent., etc., R. Co.*, 67 N. Co., 115 N. Y. 109, 21 N. E. 712;  
 Y. 421; *Reynolds v. Same*, 58 N. Y. *Swift v. Staten Island, etc., R. Co.*,

to appreciate the perils incident to crossing railroad tracks. This presumption may, in a proper case, be so far overborne by evidence as to present a question for the jury, and then the age of the injured party may be considered by the jury in connection with the facts indicating a lack of comprehension of a dangerous situation. But in the absence of evidence tending to show that an injured infant twelve years old was not qualified to understand the danger and appreciate the necessity for observing that degree of caution in crossing a railroad track which an adult would, he must be deemed *sui juris*.”<sup>82</sup> The rule adopted by the New York courts in the earlier cases, holding an infant to the same degree of care as an adult was subsequently repudiated by the Court of Appeals of that State, which adopted the rule now generally held as above stated.<sup>83</sup> In Pennsylvania it has been held that the presumption that a child under the age of fourteen years is incapable of contributory negligence, and that a child of that age is capable, is not conclusive, and may be overthrown by proof as to the actual capacity of the child; that defendant in an action for damages sustained by a parent through injury to his child has the burden of proving contributory negligence on the part of the parent, and the latter is entitled to go to the jury if he establishes a case of negligence against the defendant, without disclosing contributory negligence on his own part.<sup>84</sup> The courts have held that the rule requiring the ordinary traveler in crossing a street railroad to use his powers of observation to discover approaching vehicles, and

123 N. Y. 645, 650, 25 N. E. 378; O'Mara v. Hudson R. R. Co., 38 N. Y. 449.

**82.** Costello v. Third Ave. R. Co., *supra*; Tucker v. New York Cent., etc., R. Co., 124 N. Y. 308, 36 St. Rep. (N. Y.) 273, 26 N. E. 916; Zwack v. New York, etc., R. Co., 160 N. Y. 362, 54 N. E. 785, in the case of a boy ten years of age.

**83.** Thurber v. Harlem, etc., R. Co., 60 N. Y. 326, repudiating former rule as laid down in Honegsberger v. Sec-

ond Ave. R. Co., 2 Abb. Ct. App. Dec. 378, 1 Keyes (N. Y.) 574; Burke v. Seventh Ave., etc., R. Co., 49 Barb. (N. Y.) 529; Solomon v. Central Park, etc., R. Co., 1 Sweeney (N. Y.) 298, and Squire v. Same, 36 N. Y. Super. Ct. 432; Swift v. Staten Island R. T. Co., 123 N. Y. 645, 33 St. Rep. (N. Y.) 604.

**84.** Phillips v. Duquesne Trac. Co., 8 Pa. Super. Ct. 210, 42 W. N. C. 528, 29 Pittsb. L. J. N. S. 60.

his judgment how to cross without collision, is binding upon a child who is *sui juris*, and that a child who has sufficient intelligence to apprehend the danger of running in front of a street car, and has in mind the necessity of taking precaution, is guilty of contributory negligence in running in front of a car, even though he does not fully possess the intelligence of an adult.<sup>85</sup> The courts have applied the rule stated to many different cases and circumstances, in some instances holding such children guilty of contributory negligence, as a matter of law, and in others not chargeable, as matter of law, with such negligence. Where plaintiff, a boy eight years old, standing on a street car track while a car was approaching sixty to seventy-five feet from him, and going nine miles an hour, was as capable of self-protection as is usual with boys of his age, and did not claim that he was confused, and the motorman, perceiving that plaintiff saw his car, made no effort to stop, it was held that the evidence showed such contributory negligence that a verdict for plaintiff would be set aside.<sup>86</sup> Where it appeared that plaintiff was a boy about nine years of age, and of unusual intelligence; that he had lived opposite the place of the accident for two years, and was in the habit of crossing the tracks daily; that he saw the car pass north on the east track, and knew that the south-bound cars ran on the west track; and that there was nothing to prevent him from seeing the south-bound car, nor to divert his attention, if he had looked, it was held that he was

**85.** *Fitzhenry v. Consol. Trac. Co.*, 64 N. J. L. 674, 46 Atl. 698; *Henderson v. Detroit Citizens' R. Co.*, 116 Mich. 368, 74 N. W. 525, 4 Detroit Leg. N. 1205, 10 Am. & Eng. R. Cas. N. S. 812. A boy fourteen years old, riding on the front platform of an electric car, was thrown or kicked from the car by the motorman. He walked back a short distance somewhat lamely, and while in the act of crossing the farther track was struck by a car, and died from the injuries received. The place was well lighted by electric lights, and the car was

well lighted, and about 125 feet distant when he attempted to cross the tracks. There was no evidence that he looked or listened, or that he was so injured as to be unable to use his powers of sight and hearing. The court held that the railroad company was not liable for his death. *Pinder v. Brooklyn Heights R. Co.*, 173 N. Y. 519, 66 N. E. 405; revg. 72 N. Y. Supp. 1082.

**86.** *Griffith v. Met. St. Ry. Co.*, 66 N. Y. Supp. 801, 32 Misc. Rep. (N. Y.) 289.

guilty of contributory negligence.<sup>87</sup> Where it appeared that an intelligent boy, fourteen years old, who was walking along a street in which street cars were operated, and who was watching a train on a railroad nearby, stepped on the track in front of a street car coming up behind him, and was killed; that he did not look for the car, which was running from three to six miles an hour, though it was in the daytime, and there was nothing to obstruct his view, or which demanded his attention; that he was a country boy, but had frequently been in the city, it was held sufficient to show contributory negligence of the boy as a matter of law, which would warrant a directed verdict in an action against the company.<sup>88</sup> Where it appeared that plaintiff, a child thirteen years of age, attempted to cross a street traversed by a single street railway track, on which defendant's cars ran north, at a time of day when the cars could easily be seen; that, with the exception of a wagon going south, which plaintiff permitted to pass before starting across the street, there was nothing to obstruct her view; that she did not look to see whether a car was approaching after leaving the sidewalk, and, though the driver of the car and others warned her, which warning could have been heard but for the fact that her ears were inclosed in a shawl, she stepped on the track, and was struck, the driver bringing the car to a stop within five feet, it was held that plaintiff was guilty of contributory negligence.<sup>89</sup> A child between eight and nine years of age, who attempts to cross a city street in the middle of a block, either without looking for an approaching street car, or in blind and heedless disregard of its rapid approach, is negligent.<sup>90</sup> Where a boy of thirteen walks from one side of a street, on which there are double car tracks, toward the other side, at night, and, without stopping, collides with a street car moving at the rate of six miles an hour, where there was nothing to prevent both seeing and hearing it,

**87.** *Ryan v. La Crosse City Ry. Co.*, 108 Wis. 122, 83 N. W. 770. R. Co., 54 App. Div. (N. Y.) 291, 66 N. Y. Supp. 594.

**88.** *Willis v. Ashland, etc., St. R. Co.*, 108 Wis. 255, 84 N. W. 998. **90.** *Weiss v. Metropolitan St. Ry. Co.*, 165 N. Y. 665, 59 N. E. 1132; affg. 33 App. Div. (N. Y.) 221, 53 N. Y. Supp. 449.

**89.** *Biederman v. Dry Dock, etc.,*

there can be no recovery for resulting injury.<sup>91</sup> A boy eleven years old is required to use some care and prudence in attempting to cross an electric railway track in front of an approaching car, and a child ten years old, knocked down by horses attached to a car, is guilty of contributory negligence in crossing a street by a diagonal crosswalk with the horse car coming toward her, and failing to look in the direction in which she is running.<sup>92</sup> A dumb boy, fourteen years old, with average intelligence and good eyesight, is chargeable with contributory negligence in failing to look for an electric car when crossing its tracks.<sup>93</sup> A girl fourteen years old, familiar with street railway tracks and cars and their mode of operation, who darts suddenly across the street in the rear of a passing car, without looking for a car approaching on the other track, by which she is killed, is guilty of such negligence as will prevent recovery for her death.<sup>94</sup> A bright boy eleven years old, standing at night on the off side of a downtown track of a street railway, waiting for the passage of a car on the uptown track, was, as a matter of law, guilty of contributory negligence in stopping on the downtown track, twelve or fifteen feet in front of an approaching downtown car, without looking up the track to see whether it was safe, precluding recovery for injuries sustained by being struck by a car after he had tripped and fallen.<sup>95</sup> A bright, intelligent boy, eight years and ten months old, is guilty of contributory negligence, as a matter of law, precluding recovery for his death from being run over by a street car, where, with the car close upon him, he attempted to cross, in the middle of a block, a narrow street, and tripped and fell on the track.<sup>96</sup> A boy nine and a half years old who, while playing in a street, runs in front of a trolley car whose gong was ringing,

**91.** *Kaiser v. New Orleans, etc.*, R. Co., 107 La. 539, 32 So. 75.

**92.** *McLaughlin v. New Orleans, etc.*, R. Co., 48 La. Ann. 23, 18 So. 703; *Sheets v. Connolly St. R. Co.*, 54 N. J. L. 518, 24 Atl. 483.

**93.** *Thompson v. Salt Lake R. T. Co.*, 16 Utah 281, 52 Pac. 92, 40 L. R.

A. 172, 10 Am. & Eng. R. Cas. N. S. 563.

**94.** *Thompson v. Buffalo R. Co.*, 145 N. Y. 196, 39 N. E. 709, 64 St. Rep. (N. Y.) 591.

**95.** *O'Rourke v. New Orleans, etc.*, R. Co., 51 La. Ann. 755, 25 So. 323.

**96.** *Bello v. Metropolitan St. Ry.*

and which he saw was approaching, is chargeable with contributory negligence, and a boy eight years old was, as matter of law, guilty of contributory negligence precluding recovery for his death, where he attempted to run across the street immediately in front of an approaching electric car which was in plain sight, and which could be plainly heard.<sup>97</sup> In an action against a street railroad company to recover for injuries sustained by a boy between nine and ten years of age in being run over by a car left in the street at the end of defendant's line, and which the boy's companions had released and set in motion, while he was trying to run in front of it, plaintiff cannot recover if the element of danger was not a hidden one, but was open to observation, and could have been comprehended by a boy of plaintiff's age, with average intelligence, and the cars were held by brakes of the ordinary kind, which were set so as to hold the car where it was left unless some one loosened them.<sup>98</sup> But the courts have held, on the other hand, that a ten-year-old boy is not, as a matter of law, guilty of contributory negligence precluding recovery for his death from being struck by an electric car approaching without signals, and at the rate of twelve miles an hour, while he was crossing the track in a crowd of school children, in failing to see the car coming toward him, although he might have seen it if he had looked.<sup>99</sup> So, a boy ten years old is not, as matter of law, guilty of negligence in attempting to cross an electric railway

Co., 2 App. Div. (N. Y.) 313, 73 St. Rep. (N. Y.) 18; affg. 70 St. Rep. (N. Y.) 252, 35 N. Y. Supp. 831.

**97.** *Brady v. Consol. Traction Co.*, (N. J.) 42 Atl. 1054; *Morey v. Gloucester St. Ry. Co.*, 171 Mass. 164, 50 N. E. 530; *Ledman v. Dry Dock, etc., R. Co.*, 28 App. Div. (N. Y.) 197, 50 N. Y. Supp. 895; *De Ioia v. Metropolitan St. Ry. Co.*, 37 App. Div. (N. Y.) 455, 56 N. Y. Supp. 22, where a boy ten years of age attempted to cross a street car track, after dark, and above the crossing, in front of an approaching car, not

more than ten feet distant, going at the usual rate of speed; *Mullen v. Springfield St. Ry. Co.*, 164 Mass. 450, 41 N. E. 664, where a boy of nine years was run over by an electric car by jumping from a wagon immediately in front of the car, after being warned to look out for it.

**98.** *George v. Los Angeles Ry. Co.*, 126 Cal. 357, 58 Pac. 819, 46 L. R. A. 829.

**99.** *Consol. City, etc., R. Co. v. Carlson*, 58 Kan. 62, 48 Pac. 635, 7 Am. & Eng. R. Cas. N. S. 274.

track in front of a car which is eighty feet away, and a boy of nine years is not, as matter of law, guilty of contributory negligence in attempting to cross a street railway track after looking in both directions without seeing a car approaching, or in deciding to cross a street car track twenty-four feet from him while a car propelled by horses is sixty-five feet distant, or by attempting to cross on reaching the track instead of going back, when the driver suddenly increases the speed of the car.<sup>1</sup> A bright boy between eight and nine years of age is not negligent, as matter of law, in attempting to cross the street at a point near a trolley car track, upon seeing a car fifty feet away, and a child of seven and a half years of age is not guilty of contributory negligence *per se* in trying to run across a street car track in front of an approaching car, where he could cross in safety if it were traveling at an ordinarily safe rate of speed.<sup>2</sup> It is not negligence *per se* for a child to be upon a street railway track at a place other than that at which pedestrians usually cross the street, so as to preclude recovery for injuries sustained by her, nor is she necessarily deprived of a recovery because she was injured while playing on the street.<sup>3</sup> A girl eleven and a half years old, living near a street railroad crossing, and familiar with the running of the cars is not, as matter of law, guilty of contributory negligence in going upon the track without looking or taking precaution to discover the approach of a car.<sup>4</sup> A child of tender years is not guilty of contributory negligence in failing to look before crossing a street

1. *Kitay v. Brooklyn, etc., R. Co.*, 23 App. Div. (N. Y.) 228, 48 N. Y. Supp. 982; *Ellick v. Metropolitan St. Ry. Co.*, 15 App. Div. (N. Y.) 556, 44 N. Y. Supp. 523; *Rosenberg v. West End St. R. Co.*, 168 Mass. 561, 47 N. E. 435. A boy ten years old is not, as matter of law, guilty of contributory negligence in stepping onto the rail of a street car track so soon after it has been welded that it is still hot, where the rail has so far cooled that it is black, and the place at which the weld is made is not

guarded in any manner. *Kane v. West End St. R. Co.*, 169 Mass. 64, 47 N. E. 501.

2. *Dowd v. Brooklyn Heights R. Co.*, 29 N. Y. Supp. 745, 9 Misc. Rep. (N. Y.) 279; *Young v. Atlantic Ave. R. Co.*, 31 N. Y. Supp. 441, 10 Misc. Rep. (N. Y.) 541.

3. *Mitchell v. Tacoma, etc., R. Co.*, 9 Wash. 120, 37 Pac. 341.

4. *Consolidated, etc., R. Co. v. Wyatt*, 59 Kan. 772, 52 Pac. 98, 9 Am. & Eng. R. Cas. N. S. 756.

railway track.<sup>5</sup> Where a child seven years old was somewhat familiar with street cars, and knew that his coming in contact with a moving car would hurt him, and had been told that the crossing where he was injured was dangerous, but it appeared that his attention was attracted, while crossing the street, by a street car coming toward him and sounding a gong, which he hurried to avoid, and was struck and injured by a car going in the opposite direction, it was held not sufficient, as a matter of law, to show that the negligence of the child contributed to the accident.<sup>6</sup>

§ 429. **Contributory negligence of parents, guardians, or custodians.** — The parents of a child of tender age are required to exercise a reasonable degree of care and vigilance in guarding and protecting it from dangers to which its own want of experience may subject it.<sup>7</sup> But the law does not require the parent to suspend his business and keep his child, when at home, every moment under his eye.<sup>8</sup> The fact that such a child is found in the street unattended or accompanied by other children too young to protect it, is presumptive evidence of negligence on the part of the parents, guardian, or custodian, but such presumption may be overcome by proof that the parents or custodian have exercised reasonable care and supervision over the child and were not at fault because of its escape into the street.<sup>9</sup> Whether or not it is negligence to permit a young child to go into the street alone, or to send it unattended

5. *Mitchell v. Tacoma, etc., R. Co.*, 13 Wash. 560, 43 Pac. 528.

6. *Citizens' St. R. Co. v. Hamer*, 29 Ind. App. 426, 62 N. E. 658, 63 N. E. 778.

7. *Phila. & R. R. Co. v. Long*, 75 Pa. St. 257, such care must be reasonable care, depending on the circumstances; *Weil v. Dry Dock, etc., R. Co.*, 119 N. Y. 147, 23 N. E. 487; *Farris v. Cass Ave., etc., R. Co.*, 80 Mo. 325; *Rosencranz v. Lindell St. Ry. Co.*, 108 Mo. 9, 18 S. W. 890; *Winters v. Kansas City, etc., R. Co.*,

99 Mo. 509, 12 S. W. 652; *Hoppe v. Chicago, etc., R. Co.*, 61 Wis. 357, 21 N. W. 227.

8. *Weil v. Dry Dock, etc., R. Co.*, 119 N. Y. 197.

9. *Pittsburgh, etc., R. Co. v. Pearson*, 72 Pa. St. 169; *Farris v. Cass Ave., etc., R. Co.*, 80 Mo. 325, as to child of two years; *Mangam v. Brooklyn City R. Co.*, 36 Barb. (N. Y.) 130, as to child of four years; *Glassy v. Hestonville, etc., R. Co.*, 57 Pa. St. 172; *Mack v. Lombard, etc., R. Co.*, 8 Pa. Co. Ct. Rep. 305.

by a competent custodian, and thus expose it to danger, may be a question of fact or of law. The courts usually regard it a question of law when the child is *non sui juris*, and, therefore, incapable of avoiding the dangers to which it would naturally be subjected. For instance, it has been held that the parents of a child three and a half years old, who allow it to play upon the streets at night, unattended and uninstructed as to the dangers, are guilty of such contributory negligence as will bar recovery for the death of the child who was mortally injured by a railway car passing the parents' door;<sup>10</sup> that a mother, who, while talking to friends at her door, leaves a child twenty months old in the kitchen, and allows it to pass her, cross the sidewalk, and go twenty-eight feet to a street railroad track, where it is killed in her immediate view, without her knowing that it is her child until after the accident, is guilty of negligence which will preclude recovery by her for its death;<sup>11</sup> and that a parent who leaves his four-year-old child playing on the pavement, and goes away where he cannot watch the child, and it is killed by a car passing along the street, is guilty of contributory negligence and cannot recover damages.<sup>12</sup> The rule has been applied in the case of older children in several instances, the parents of children seven and eight years of age being held guilty of contributory negligence under special circumstances.<sup>13</sup> It has been held not *per se* negligence

10. *Juskowitz v. Dry Dock, etc.*, R. Co., 53 N. Y. Supp. 992, 25 Misc. Rep. (N. Y.) 64.

11. *Johnson v. Reading City Pass. R. Co.*, 160 Pa. St. 647, 28 Atl. 1001, 34 W. N. C. 203; *Chavais v. Dry Dock, etc.*, R. Co., 70 N. Y. Supp. 1014, 34 Misc. Rep. (N. Y.) 694, it seems that a mother who has been sitting with her infant of tender years in her lap, in a chair on the sidewalk, on a street traversed by street cars, is chargeable with contributory negligence in leaving the child alone in the chair, and crossing the street on an errand.

12. *Schwartz v. United Trac. Co.*, (Pa.) 30 Pittsb. L. J. N. S. 153.

13. *Smith v. Hestonville, etc.*, R. Co., 92 Pa. St. 450, where a parent permitted a child seven years of age to engage in the business for a compensation of serving drivers and conductors of street cars with water to drink; *Reed v. Minneapolis St. Ry. Co.*, 34 Minn. 557, where an adult having the care of a girl eight years old left a horse car with her and immediately stepped on an adjacent track, without having hold of the child, and without having paid any attention to possible dangers, except

on the part of the parents that a child of the age of six years and ten months was permitted to be alone in the streets of a city unattended;<sup>14</sup> and the same ruling was made as to parents who permitted a child five years of age to go into the street;<sup>15</sup> and in a later case where parents permitted a five-year-old child to cross a street to purchase candy, within sight of an older sister.<sup>16</sup> And parents have been held not chargeable with contributory negligence, as a matter of law, in permitting a four-year-old boy to go upon the streets in charge of his eleven-year-old sister.<sup>17</sup> It has been held not negligence *per se* for parents to place a child three or four years of age in a room by an open window four feet from the floor, where the door was locked and the window was the only means of egress;<sup>18</sup> nor to permit a child four years of age to walk in the street in daylight under the care of a sister eleven years old;<sup>19</sup> nor to permit a young child to go upon a street attended by a child nine and a half years old;<sup>20</sup> nor for parents keeping a bakery fronting on the street through which a line of street cars is operated, to permit a child three and a half years old to go upon the sidewalk in front of their place of business in charge of a boy ten years old, the accident having occurred while the mother was waiting on a customer;<sup>21</sup> nor for a mother to permit a child four years of age to ride on a street car in charge of

in one direction, and the child was run over by a car coming in the other direction.

**14.** *Oldfield v. New York & Harlem R. Co.*, 14 N. Y. 310; *affg.* 3 E. D. Smith (N. Y.) 103; *Dahl v. Milwaukee City R. Co.*, 65 Wis. 371, 27 N. W. 185, nor to permit a child between four and five years of age to remain at home in the care of his brother thirteen years of age.

**15.** *Cumming v. Brooklyn City R. Co.*, 38 Hun (N. Y.) 362.

**16.** *Weitzman v. Nassau Elec. R. Co.*, 33 App. Div. (N. Y.) 585, 53 N. Y. Supp. 905; *Strutsel v. St. Paul*

*City R. Co.*, 47 Minn. 543, 50 N. W. 690, nor to permit a child six years of age to go out of the house to play on the parent's own premises.

**17.** *Cameron v. Duluth Superior Traction Co.*, 94 Minn. 104, 3 St. Ry Rep. 460, 102 N. W. 208.

**18.** *Mangam v. Brooklyn City R. Co.*, 38 N. Y. 455.

**19.** *Collins v. South Boston R. Co.*, 142 Mass. 301, 7 N. E. 856.

**20.** *Ihl v. Forty-Second, etc., R. Co.*, 47 N. Y. 317.

**21.** *Ehrman v. Brooklyn City R. Co.*, 14 N. Y. Supp. 336.

another child twelve and a half years old; <sup>22</sup> nor to permit a child of five to ride upon a street car accompanied by another child of eleven. <sup>23</sup> It has been held that it is not such contributory negligence as will preclude recovery, as a matter of law, for a mother to permit a child two and a half years old, accompanied by another five years old, to cross a street car track to meet its father, where she looks before consenting and sees no car approaching; <sup>24</sup> nor for a mother of a child four years and ten months old to intrust the care of the child while on a side street to a brother fifteen years old; <sup>25</sup> nor for one in charge of a child two years and two months old to release its hand for a short time while talking with a friend on a street on which street car tracks are located; <sup>26</sup> nor for parents to permit a child *non sui juris* to play in a city street; <sup>27</sup> nor for parents of a child four years old to leave her at home in charge of a sister ten years old while they are away at work; <sup>28</sup> nor for the persons in charge of a child four years old to permit it to go on a street in which street cars are operated; <sup>29</sup> nor the parents of a child sixteen months old merely because it got upon a street car track while in the care of a nurse; <sup>30</sup> nor for a parent to leave a child two and a half years old on his doorstep with an injunction not to leave the place, although a hand organ is being played on the opposite side of the street, on which an electric street railroad is in operation; <sup>31</sup> nor for the mother of a child four and a half years old to permit it to be out of her sight

**22.** Saginaw Ry. Co. v. Bohn, 27 Mich. 503.

**23.** Pittsburgh, etc., R. Co. v. Caldwell, 74 Pa. St. 421.

**24.** Martineau v. Rochester Ry. Co., 81 Hun (N. Y.) 263, 30 N. Y. Supp. 778.

**25.** Ehrman v. Nassau Elec. R. Co., 23 App. Div. (N. Y.) 21, 48 N. Y. Supp. 379.

**26.** Coghlan v. Third Ave. R. Co., 7 App. Div. (N. Y.) 124, 39 N. Y. Supp. 1098.

**27.** Huerzeler v. Central Cross-town R. Co., 20 N. Y. Supp. 676, 48

St. Rep. (N. Y.) 649, 1 Misc. Rep. (N. Y.) 136.

**28.** West Chicago St. R. Co. v. Scanlan, 68 Ill. App. 626, 2 Chic. L. J. Wkly. 113; *affd.*, 168 Ill. 34, 48 N. E. 149.

**29.** Elwood Elec. St. R. Co. v. Ross, 26 Ind. App. 258, 58 N. E. 535.

**30.** Passamaneck v. Louisville R. Co., 98 Ky. 195, 32 S. W. 620, 17 Ky. L. Rep. 763.

**31.** Karahuta v. Schuylkill Trac. Co., 6 Pa. Super. Ct. 319, 42 W. N. C. 47.

for fifteen or twenty minutes while she is engaged in work, during which time the child wandered to the street about one hundred feet away, where it was killed on a street railroad track.<sup>32</sup> But the courts have held in many cases that the question of the contributory negligence of the parents was for the jury, and it then becomes a question as to whether or not there was the exercise or omission of ordinary care and prudence under the particular circumstances of each case.<sup>33</sup> Where a child *non sui juris* was in-

**32.** Fox v. Oakland Consol. St. R. Co., 118 Cal. 55, 50 Pac. 25.

**33.** Barry v. Second Ave. R. Co., 16 N. Y. Supp. 518, in an action for injuries to a child four years old who was run over by a street car, the question whether his presence in the street alone was due to the negligence of his parents is for the jury, where it is shown that he was left alone, in a room with the doors shut, for a few minutes before the accident, and escaped therefrom without any one's knowledge, and that he had never been known to go on the street alone before; Fallon v. Central Park, etc., R. Co., 64 N. Y. 13, where a child five years of age, who has not before been known to go out upon the street unattended, escapes from the house, the evidence does not establish contributory negligence on the part of the mother, as a matter of law, but should be submitted to the jury; Pittsburgh, etc., Ry. Co. v. Pearson, 72 Pa. St. 169, where a child eighteen months old, left in the charge of a sister thirteen years of age, escaped from the house while the barrier across the door was removed in order to allow the mother to scrub, it was held that the question of the contributory negligence of the parents was for the jury; Roller v. Sutter St. R. Co., 66 Cal. 230, 5 Pac. 108,

where a child was left by its parents at home in the care of its grandmother, and the door leading from the house to the street was left open, and the child escaped into the street and was injured while attempting to cross in front of a car, it was held that the question of the parents' contributory negligence should have been submitted to the jury; Ames v. Broadway, etc., R. Co., 4 N. Y. Supp. 803, 56 N. Y. Super. Ct. 3, where a mother allowed her child five years of age to play in a certain court having near it the means of escape into the street, telling her not to leave the door, and the child went into the street and was there injured, it was held that the question of the mother's negligence was properly submitted to the jury; Schierhold v. North Beach, etc., R. Co., 40 Cal. 447, whether it is negligence on the part of parents to allow a child seven years old to go into the streets unattended is a proper question to be submitted to the jury; Lifschitz v. Dry Dock, etc., R. Co., 67 App. Div. (N. Y.) 602, 73 N. Y. Supp. 888, where an infant four years of age, conceded to be *non sui juris*, was run down by one of the defendant's horse cars while walking by the side of his father, who was wheeling another child in a baby carriage

jured by being struck by a street car in consequence of the negligence of her brother, a boy nine years old, whom the mother had given charge of the child, the question whether the mother was guilty of negligence in permitting the boy to take charge of the child on the street was held to be for the jury.<sup>34</sup> In another case it was held that the case could not be withheld from the jury on the ground that plaintiff was negligent in not selecting a proper caretaker for his child, three years and nine months old, or that such person was negligent; it appearing merely that the child went out on the sidewalk and there was sitting in a chair in charge of a nurse girl; that, unobserved by the nurse, she started to cross the street; that the nurse started after her, but, for fear of being hurt by an approaching car, did not cross the track; and that the child turned back and got on the track.<sup>35</sup> Where a father having got off a car with a child seven and a half years of age, returned to assist his wife, leaving the child to go on alone, the child turned to follow her father and was struck by the car, the question of contributory negligence was held to be properly submitted to the jury.<sup>36</sup> But the negligence of the parents of a child *non sui juris* will not prevent recovery by its father for its death from being run over by a street car, where the child has exercised due care and was not itself guilty of contributory negligence.<sup>37</sup> The negligence of the parents of a child four and a half years old in permitting it to wander upon a street railway track will not relieve the company from liability for its death by running a car over it, where no injury would have occurred but for the gross negligence of the employees in charge of the car.<sup>38</sup>

across the defendant's tracks, the contributory negligence of the father was held to be a question for the jury.

**34.** *Adams v. Metropolitan St. Ry. Co.*, 60 App. Div. (N. Y.) 188, 69 N. Y. Supp. 1117.

**35.** *Koersen v. New Castle Elec. St. Ry. Co.*, 198 Pa. St. 30, 47 Atl. 851.

**36.** *Kitchell v. Brooklyn Heights R. Co.*, 6 App. Div. (N. Y.) 99, 39 N. Y. Supp. 741.

**37.** *Huerzeler v. Central Cross-town R. Co.*, 20 N. Y. Supp. 676, 48 St. Rep. (N. Y.) 649, 1 Misc. Rep. (N. Y.) 136; *Cumming v. Brooklyn City R. Co.*, 104 N. Y. 669, 10 N. E. 885.

**38.** *Fox v. Oakland Consol. St. R. Co.*, 118 Cal. 55, 50 Pac. 25, 9 Am. & Eng. R. Cas. N. S. 825; *Schierhold v. North Beach, etc., R. Co.*, 40 Cal. 447.

**§ 430. Contributory negligence of aged and infirm persons.** — A person who is laboring under the infirmities incident to old age, or who is crippled or otherwise physically disabled, is bound to exercise only such a degree of care and diligence to avoid danger as his physical and mental capacity enable him to exercise.<sup>39</sup> And where a person eighty-nine years of age looked before attempting to cross the track and saw a car moving out of a switch in the opposite direction, it was held that he was not guilty of contributory negligence since the street railway being operated on a single track he knew, or thought he knew, that no immediate danger was to be apprehended.<sup>40</sup> It has been held that idiots and insane persons are not held to the same rule of responsibility for their negligence as persons of sound and vigorous mind.<sup>41</sup> The fact that a person who is blind or deaf is injured in a public and dangerous place, where sight and hearing are ordinarily required to avoid injury, is not sufficient, as matter of law, to prove contributory negligence, but the physical defect may be considered as an evidence of contributory negligence, and if, in connection with the exposure to danger, it was the proximate cause of an injury which otherwise would not have occurred, it would constitute contributory negligence, as a matter of law.<sup>42</sup> Persons who are blind or deaf, or whose sight or hearing is impaired are not relieved from the duty of exercising ordinary care or excused from contributory negligence, but their misfortune imposes upon them the obligation of taking greater precaution to avoid danger.<sup>43</sup> Whether

**39.** *Chicago West. D. Ry. Co. v. Haviland*, 12 Ill. App. 561; *Jacksonville St. Ry. Co. v. Chappell*, 21 Fla. 175; and cases generally cited under this section.

**40.** *Perjue v. Citizens' Elec. L. & G. Co.*, 131 Iowa 710, 5 St. Ry. Rep. 313, 109 N. W. 280.

**41.** *O'Flaherty v. Union Ry. Co.*, 45 Mo. 70.

**42.** *Harris v. Uebelhoer*, 75 N. Y. 169; *Sluper v. Sandown*, 52 Vt. 251. It is contributory negligence for one of defective eyesight or hearing to

walk upon a railroad track at a time when a train is known to be due. *Maloy v. Wabash, etc., R. Co.*, 84 Mo. 270; *Shapley v. Wyman*, 134 Mass. 118; *Stewart v. Rippon*, 38 Wis. 584; *O'Mara v. Hudson, etc., R. Co.*, 38 N. Y. 445; *Phillips v. Dickerson*, 85 Ill. 11; *Davenport v. Ruckman*, 37 N. Y. 568.

**43.** *Ft. Smith Light & Tr. Co. v. Barnes*, 80 Ark. 149, 5 St. Ry. Rep. 41, 96 S. W. 976; *Adams v. Boston & N. St. Ry. Co.*, 191 Mass. 486, 78 N. E. 117, 5 St. Ry. Rep. 442; *Gonzales*

or not an aged or infirm person was negligent in a given case is quite generally a question for the jury to determine from the particular circumstances surrounding the case.<sup>44</sup> Thus, where plaintiff, a woman sixty years of age, before starting to cross the street in the middle of a block, stopped and looked, and saw that there was no approaching car nearer than one in the next block, and that it was slackening its speed at the crossing; there was evidence tending to show that the motorman had applied the power at the corner, that the speed increased until plaintiff was struck, that no bell was rung, and that the motorman's head was turned, and he was talking with a person inside the car, it was held that whether plaintiff exercised reasonable care, and whether defendant was negligent, should have been submitted to the jury, and it was error to nonsuit plaintiff.<sup>45</sup> Failure to look and listen before attempting to cross an electric street railroad track is not, as a matter of law, such contributory negligence as will prevent recovery for an injury caused by a collision with a car, and a man whose eyesight and hearing are impaired is not, as a matter of law, guilty of negligence in attempting to cross a street railway track while unattended.<sup>46</sup> One who is a little deaf is not guilty of such negligence as will prevent recovery for an injury, in walking along the track of an electric railroad company, or a space two feet wide between it and a side ditch, in the same direction in which the

v. New York, etc., R. Co., 50 How. Pr. (N. Y.) 126, 1 J. & S. (N. Y.) 57; Zimmerman v. Hannibal & St. J. R. Co., 71 Mo. 476; Cleveland, C. & C. R. Co. v. Terry, 8 Ohio St. 570; Purl v. St. Louis, etc., R. Co., 72 Mo. 168; Winn v. Lowell, 1 Allen (Mass.) 177; Central R. Co. v. Buckner, 28 Ill. 299; Central, etc., R. Co. v. Feller, 84 Pa. St. 226; Elkins v. Boston, etc., R. Co., 115 Mass. 190; West v. New Jersey, etc., Trans. Co., 32 N. J. L. 91; Morris, etc., R. Co. v. Haslan, 33 N. J. L. 147; Cawley v. La Crosse City Ry. Co., 106 Wis. 239, 82 N. W. 197; Atlanta Consol. St.

Ry. Co. v. Bates, 103 Ga. 333, 30 S. E. 41; Aldrich v. St. Louis Trans. Co., 1 St. Ry. Rep. 449, and notes, (Mo.) 74 S. W. 141.

44. Walls v. Rochester R. Co., 92 Hun (N. Y.) 581, 36 N. Y. Supp. 1102, 72 St. Rep. (N. Y.) 250; Killen v. Brooklyn Heights R. Co., 64 N. Y. Supp. 310, 31 Misc. Rep. (N. Y.) 290.

45. Killen v. Brooklyn Heights R. Co., 48 App. Div. (N. Y.) 557, 62 N. Y. Supp. 927.

46. Robbins v. Springfield St. R. Co., 165 Mass. 30, 42 N. E. 334.

cars are running, where there is no sidewalk or path.<sup>47</sup> Evidence that plaintiff, aged eighty and a little deaf, could have seen the car which injured her had it been within half a block, but that she neither saw nor heard it, although it was her habit to look up and down for danger, the testimony of another witness being that plaintiff did so look on this occasion, was held to sustain a finding in her favor.<sup>48</sup> But a deaf person with good eyesight is guilty of such negligence as will prevent recovery by stepping on a street car track in the daytime in front of an approaching car which he could have seen if he had looked.<sup>49</sup> A person afflicted with deafness and wearing a sunbonnet protruding so as to obstruct her sight, who attempts to cross a street railway track without looking to the right or left, is guilty of contributory negligence and cannot recover for injuries sustained by collision with an approaching car.<sup>50</sup> A deaf person is, as a matter of law, guilty of gross negligence in attempting to ride a bicycle in the space between the lines of a street railway company upon which the cars may, under a city ordinance, be run at the rate of twenty miles an hour, without paying any attention to the approach of the car behind him, relying on his ability to keep out of its way, or to turn out as it comes up beside him.<sup>51</sup> A woman seventy-two years old, however, is not, as a matter of law, guilty of contributory negligence in attempting to cross a street railway track in front of an approaching car which is from ninety to one hundred feet distant at the time she steps upon the track upon which the car is running.<sup>52</sup> An elderly man who is injured while attempting to jump from a street car in slow motion, without notice to the

47. *Butelli v. Jersey City, H. & R. Elec. R. Co.*, 59 N. J. L. (30 Vroom) 302, 36 Atl. 700, 2 Chic. L. J. Wkly. 202.

48. *Cowan v. Third Ave. R. Co.*, 9 N. Y. Supp. 610, 31 St. Rep. (N. Y.) 145.

49. *Hall v. West End St. R. Co.*, 168 Mass. 461, 47 N. E. 124; *Shanks v. Springfield Traction Co.*, 1 St. Ry. Rep. 465, 101 Mo. App. 702, 74 S. W.

386, or in walking upon street car tracks without looking back frequently to see if a car is approaching.

50. *Schulte v. New Orleans, etc., R. Co.*, 44 La. Ann. 509, 10 So. 811.

51. *Nein v. La. Crosse City R. Co.*, 92 Fed. 85, 34 C. C. A. 224.

52. *Walls v. Rochester R. Co.*, 92 Hun (N. Y.) 581, 36 N. Y. Supp. 1102, 72 St. Rep. (N. Y.) 250.

driver of his intention, although he had previously requested him to stop and been rudely answered, cannot recover against the carrier for injuries caused by a sudden jerk of the car by the team drawing it when struck by the whip just as he is alighting.<sup>53</sup> It is negligence *per se* for one crippled so as to need assistance in getting on or off a train or car at rest, to attempt to board a moving train or car.<sup>54</sup> In an action against a street car company for wilfully injuring a deaf-mute thirteen years of age on a street crossing, evidence that the street was dark, and the headlight, which obscured the view of the street except directly in front of the cars, made it difficult for the motorman to see a person near the side of the street; that the gong was sounded; and as soon as the motorman perceived the boy, when about twenty feet from the street intersection, he was skipping toward the track; and that the car was reversed, and the gong sounded louder, was held sufficient to justify a finding for the defendant.<sup>55</sup> The plaintiff, in an action against a street car company for injuries sustained while crossing the track, enjoyed his faculties of sight and hearing unimpaired at an advanced age; his steps were slow, but the evidence did not show that he could not cross before the coming car, or that he might be expected to fail properly to use his senses of hearing and seeing, and undertake to make the crossing, despite the danger to which it was attempted to call his attention by ringing the gong and loudly hallooing to him; it was held that the caution of the motorman in slackening speed and sounding the gong on seeing plaintiff approach the track was sufficient, and that he was not bound to stop the car at once.<sup>56</sup>

**53.** *Outen v. North & S. St. R. Co.*, 94 Ga. 662, 21 S. E. 710.

**54.** *Cincinnati, H. & D. R. Co. v. Nolan*, 8 Ohio C. C. 347. See *Shaughnessy v. Sonsol. Traction Co.*, 17 Pa. Super. Ct. 588.

**55.** *Bonham v. Citizens' St. R. Co.*, 158 Ind. 106, 62 N. E. 996.

**56.** *Farrar v. New Orleans & C. R. Co.*, 52 La. Ann. 417, 26 So. 995.

**CHAPTER XIX.****The Company and Its Employees.**

- SECTION** 431. Care required of the company.  
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§ 431. Care required of the company. — The rules of law applicable to the relation of master and servant are generally applicable to street railroads in their relations to their employees.

It is the duty of a master to use ordinary care to provide and maintain for his employees a safe place in which to work and safe and reasonably suitable machinery and appliances with which to work, so that the employee may enter upon his labor assuming that these duties have been performed.<sup>1</sup> Such machinery and appliances need not, however, be the latest, the safest known, the most improved, or the best.<sup>2</sup> He is not obliged to furnish absolutely safe appliances or machinery with which to work, but discharges the full measure of his duty towards his servant when he exercises ordinary and reasonable care to supply and maintain safe machinery, tools, and appliances with which to do the required work.<sup>3</sup> In the absence of a contract or established custom,

1. *Birmingham Ry., L. & P. Co. v. Sawyer*, 156 Ala. 199, 6 St. Ry. Rep. 765, 47 So. 67; *Carter v. McDermott*, 35 Wash. L. Rep. 158, 5 St. Ry. Rep. 72; *Kentucky & Indiana Bridge & R. Co. v. Moran*, 169 Ind. 18, 5 St. Ry. Rep. 272, 80 N. E. 536; *Atlantic & D. Ry. Co. v. West*, 101 Va. 13, 42 S. E. 914; *Strattner v. Wilmington City Elec. Co.*, 3 Penn. (Del.) 245, 50 Atl. 57; *Gaulden v. Kansas City St. Ry. Co.*, 106 La. 409, 30 So. 889, and also to keep them in good repair; *Streets Western Cable Car Line v. Bonander*, 97 Ill. App. 601; *affd.*, 63 N. E. 688; *Hass v. Chicago, B. & Q. R. Co.*, 97 Ill. App. 624; *Lincoln St. R. Co. v. Cox*, 48 Neb. 807, 67 N. W. 740, 4 Am. & Eng. R. Cas. N. S. 273; *Stourbridge v. Brooklyn City R. Co.*, 9 App. Div. (N. Y.) 129, 41 N. Y. Supp. 128; *Byrne v. Brooklyn City R. Co.*, 6 Misc. Rep. (N. Y.) 441, 27 N. Y. Supp. 126.

"It is the duty of the employer to select and retain servants who are fitted and competent for the service, and to furnish sufficient and safe materials, machinery, or other means, by which it is to be performed and to

keep them in order and repair. This duty he cannot delegate to a servant so as to exempt himself from liability for injuries caused to another servant by its omission. Indeed, no duty required of him for the safety and protection of his servants can be transferred so as to exonerate him from liability." *Northern Pac. R. Co. v. Herbert*, 116 U. S. 642, 647, 29 L. ed. 755, 6 S. Ct. 590, *per Mr. Justice FIELD*.

2. *Rosa v. Volkening*, 173 N. Y. 590, 65 N. E. 1122; *affg.* 72 N. Y. Supp. 236, 64 App. Div. (N. Y.) 426; *Strattner v. Wilmington City Elec. Co.*, 3 Penn. (Del.) 245, 50 Atl. 57; *Washington & G. R. Co. v. McDade*, 135 U. S. 554, 34 L. ed. 235, 10 S. Ct. 1044. It is sufficient that the machinery and appliances are such as are in common and general use throughout the country in the same and similar lines of work. *Shadford v. Ann Arbor St. R. Co.*, 111 Mich. 390, 69 N. W. 661, 3 Detroit Leg. N. 712, 6 Am. & Eng. R. Cas. N. S. 584; *Friel v. Citizens' R. Co.*, 115 Mo. 503, 22 S. W. 498.

3. *Beebe v. St. Louis Transit Co.*,

it is not a duty of a railroad company to furnish the employees on its road with food, shelter, or transportation between their homes and places of work, but if permitted to enter one of the cars and remain there, the jury might find that defendant assumed the duty of taking reasonable care of them, and of seasonably conveying them to some place where they would be taken care of.<sup>4</sup> The application of the maxim "*res ipsa loquitur*" does not ordinarily depend upon the relation between the parties, except indirectly, so far as that relation defines the measure of duty imposed on the defendant. Under certain circumstances it may apply in an action brought by a servant against a master for injury caused by an agency of the master. The maxim at most raises a *prima facie* case of negligence, which is rebuttable. No presumption of negligence necessarily follows the plaintiff through the case, so as to compel the submission of the question of fact to the jury.<sup>5</sup>

206 Mo. 419, 5 St. Ry. Rep. 623, 103 S. W. 1019.

4. *King v. Interstate Consol. St. R. Co.*, 23 R. I. 583, 51 Atl. 301; *Carll v. Same*, 23 R. I. 592, 51 Atl. 305, where employees assisting in removing snow from defendant's tracks, when they could not longer work on account of the severity of the weather, were ordered to enter and permitted to remain in a car all night, unaided and without protection from cold, without food, and not allowed transportation to their homes, whereby they were injured.

5. *Jenkins v. St. Paul City Ry. Co.*, 105 Minn. 504, 6 St. Ry. Rep. 616, 117 N. W. 928. The court said: "Plaintiff's case may properly have been regarded by the trial court as resting substantially on plaintiff's own testimony and on the doctrine of '*res ipsa loquitur*.' Defendant insists, however, that this maxim does not apply as between master and servant. As a universal principle, this

is not the law in this and a number of other States. Ordinarily the application of the principle does not depend upon the relation between the parties, except indirectly, so far as that relation defines the measure of duty imposed on the defendant. *Griffin v. Manice*, 166 N. Y. 188, 59 N. E. 925, 52 L. R. A. 922, 82 Am. St. Rep. 630. There have been cases in which the servant has successfully invoked it against his master. There is more force to defendant's further contention that the doctrine should not be applied where, as here, the dangerous agency is under the immediate physical control of, and in actual use by, an experienced servant, who complains of the injury. In the case at bar, however, it is not necessary to determine this controversy, nor to inquire into the exact nature of the so-called presumption, for the *prima facie* case of negligence arising from the application of the maxim is rebuttable. From its application the

§ 432. Care required of company — Rules applied. — An electric passenger carrier fulfills its duty, so far as the controller of an electric car is concerned, if the controller is shown to have been of standard character, made by a reputable manufacturer, in good condition, and to have been subjected to such inspection as is reasonable and practicable. The carrier is required to inspect with adequate care, but not to dismantle complicated machinery for purposes of inspection.<sup>6</sup> A platform two and a half feet wide, without a guard rail, along the tracks of an elevated railway company, over which its employees are compelled to pass constitutes a reasonably safe place in which to work, so as to preclude recovery for injuries by an employee who falls from such platform to the street below.<sup>7</sup> If a servant be young, or inexperienced, or ignorant of the danger of his employment, the master must give him such instruction and warning of the dangerous character of the employment as may reasonably enable him to understand the peril thereof, and the company is guilty of negligence in failing to do so.<sup>8</sup> The failure to instruct an employee of a hidden danger, as, for instance, the danger of handling electric wires, being a duty personal to the employer and incapable of being delegated to another servant, the negligence of the foreman of the company in failing to instruct an unskilled workman will not bar a recovery

court or jury may infer negligence, but neither is bound to do so. *Car-mody v. Light Co.*, 162 Mass. 539, at page 542, 39 N. E. 184. The presumption of negligence in current phrase, whose precision is not here material, is purely one of fact, and may not survive sufficient proof of due care by the person sought to be charged. It does not necessarily follow the plaintiff through the case, so as to compel the submission of the question of fact to the jury, as, for example, does the presumption of innocence accused in a criminal trial."

6. *Jenkins v. St. Paul City Ry.*

Co., 105 Minn. 504, 6 St. Ry. Rep. 616, 117 N. W. 928.

7. *Nugent v. Brooklyn Union El. R. Co.*, 64 App. Div. (N. Y.) 351, 72 N. Y. Supp. 67.

8. *Strattner v. Wilmington City El. R. Co.*, 3 Penn. (Del.) 245, 50 Atl. 57; *Sullivan v. Met. St. Ry. Co.*, 170 N. Y. 570, 62 N. E. 110; affg. 53 App. Div. (N. Y.) 89, 65 N. Y. Supp. 842, where a conductor who has just been hired, had received no instructions as to the use of the brake, and turned it the wrong way, whereby he ran over the plaintiff, another employee of the company, and injured him.

for injuries received by the latter.<sup>9</sup> A foreman of a cable car company owes a gripman subject to his orders the duty of exercising ordinary care to prevent injury to him.<sup>10</sup> A street railroad company is under no obligation to a conductor to supply a trail car with a fender or life-guard to guard against injuries to him from being drawn under the car in case he should fall between the cars.<sup>11</sup> It is the duty of a street car company to furnish a driver with a safe team, or inform him of its bad or vicious habits, so that he may guard against them.<sup>12</sup> Where plaintiff's intestate was killed by the ordinary negligence of the company's employees while on the track of an elevated railroad, either as an employee of a contractor with whom the company had contracted or as a licensee seeking work from such contractor, in either view of the evidence the company was liable, since it owes the same affirmative duty of reasonable vigilance and care to a licensee on its tracks as to a person there on business.<sup>13</sup>

§ 433. **Duty of company to promulgate rules.** — When the business of the master is such that the safety of one servant depends upon the way in which other servants do their work, it is the duty of the master to adopt, promulgate, and enforce reasonable and sufficient rules to protect and promote the safety of its employees exposed to danger.<sup>14</sup> But the failure of a master to adopt rules as to precautions to be preserved by his employees is not proof of negligence rendering him liable to a servant, unless it appear from the nature of the business in which the servant

9. *Telford v. Los Angeles Elec. Co.*, 134 Cal. 76, 54 L. R. A. 85, 66 Pac. 76.

10. *Keown v. St. Louis R. Co.*, 141 Mo. 86, 41 S. W. 926.

11. *Denver Tramway Co. v. Nesbit*, 22 Colo. 408, 45 Pac. 405, 4 Am. & Eng. R. Cas. N. S. 605.

12. *Leigh v. Omaha St. R. Co.*, 36 Neb. 131, 54 N. W. 134.

13. *Wells v. Brooklyn H. R. Co.*, 34 Misc. Rep. (N. Y.) 44, 68 N. Y.

Supp. 305; *affd.*, 67 App. Div. (N. Y.) 212, 74 N. Y. Supp. 196.

14. *Devoe v. New York Cent. & H. R. Co.*, 174 N. Y. 1, 66 N. E. 568; *revg.* 70 App. Div. (N. Y.) 495, 75 N. Y. Supp. 136; *Chicago & N. W. R. Co. v. Taylor*, 69 Ill. 461, 18 Am. Rep. 626; *Wright's Adm'x v. Southern Ry. Co.*, 201 Va. 36, 42 S. E. 913; *Cooper v. Central R. of Iowa*, 44 Iowa 134; *Warn v. New York Cent., etc., R. Co.*, 80 Hun (N. Y.) 71, 29

is engaged that the master, in the exercise of reasonable care, should have foreseen the necessity of such precautions.<sup>15</sup> When a railroad company's employees are known to be doing their work in a reckless and dangerous manner, it is the duty of the company to change the manner of operation by some regulation or rule.<sup>16</sup> If the practice in use by the employees renders a rule unnecessary the failure of the employer to make a rule is not negligence.<sup>17</sup> In making rules for the government of its employees, a railroad corporation is only bound to use ordinary care, and to anticipate and guard against such accidents as may reasonably be foreseen by its managers exercising such ordinary care; it cannot be assumed that it can by rule guard against and prevent every injury to them.<sup>18</sup> Where the rules of an elevated railroad company required its trains to slow up when a green flag was exposed, and it appeared that it was usual to put up such flags for the protection of workmen, a general and customary violation of the rule must be shown in order to charge the company with constructive notice thereof.<sup>19</sup> And where a rule of a street railway company provided that no motorman should leave his car in the hands of another motorman or any other person without the consent of the superintendent or starter, and a motorman left his car in the hands of another motorman without such consent of superintendent or starter, and he was thereafter injured while attempting to board the car while it was under the control of the substitute

N. Y. Supp. 897; *Corcoran v. Delaware, L. & W. R. Co.*, 126 N. Y. 673, 27 N. E. 1022.

**15.** *Morgan v. Hudson R. Ore & Iron Co.*, 133 N. Y. 666, 31 N. E. 234; *Niles v. New York Cent. Ry. Co.*, 43 N. Y. Supp. 751.

**16.** *Doing v. New York, O. & W. R. Co.*, 151 N. Y. 580, 45 N. E. 1028; *revg.* 73 Hun (N. Y.) 270, 26 N. Y. Supp. 405.

**17.** *Kudik v. Lehigh Val. R. Co.*, 78 Hun (N. Y.) 492, 29 N. Y. Supp. 533; *Ely v. New York Cent., etc., R.*

*Co.*, 88 Hun. (N. Y.) 322, 34 N. Y. Supp. 739; *Sheets v. Chicago & I. C. Ry. Co.*, 139 Ind. 682, 39 N. E. 154, the mere failure of an employer to promulgate a rule is not sufficient to constitute negligence in the absence of proof that the injury was occasioned by such failure.

**18.** *Berrigan v. New York, L. E. & W. R. Co.*, 131 N. Y. 582, 30 N. E. 57.

**19.** *Clark v. Manhattan Ry. Co.*, 77 App. Div. (N. Y.) 284, 79 N. Y. Supp. 220.

motorman, it was held that he could not recover.<sup>20</sup> Where it was contended that an injury was caused by the want of some reasonable and necessary rule for the backing of cars, and the record showed that the rules of the company provided that a motorman should not start a car backward before receiving three bells from the conductor, who must remain on the rear platform while the car is moving backward, such a rule was held to be a reasonable one for the protection of the employees of the company, and it was declared that it was not error for the court to refuse to submit to the jury the question of whether such a rule was reasonable or not.<sup>21</sup>

§ 434. **Relative duties of master and servant.** — The duty of so operating a safely constructed railroad subject to the rules of the master as to keep it reasonably safe for those employed upon it is not a positive duty of the master, but a primary duty of the servant.<sup>22</sup> The selection of sound beams out of a sufficient quantity of proper and suitable material, furnished by an employer for the erection of a structure, is the duty of the fellow servants of one employed on such structure instead of the duty of the master. The master discharged its duty when it supplied a sufficient quantity of proper and suitable material for the work.<sup>23</sup>

§ 435. **Employer's liability for injuries to servants.** — A trolley car company's negligence is established by proof that, without

20. *Atlanta Ry. & Power Co. v. Bennett*, 115 Ga. 879, 42 S. E. 244.

21. *Seccombe v. Detroit Elev. Ry. Co.*, 1 St. Ry. Rep. 349, and notes 133 Mich. 120, 94 N. W. 747.

22. *Brady v. Chicago & G. W. Ry. Co.*, (U. S. C. C. A., Iowa) 114 Fed. 100, 52 C. C. A. 48, 57 L. R. A. 712.

23. *Stourbridge v. Brooklyn City R. Co.*, 9 App. Div. (N. Y.) 129, 41 N. Y. Supp. 128, holding also that crossbeams fastened to the flanges of an elevated railroad to support a trough which is bolted to the beams

do not constitute "the place" of work of an employee whose duty it is to bore holes in the beams for the bolts by which the trough is supported, but they are a part of the structure, and where such an employee was injured by the breaking of the crossbeam precipitating him to the ground, the case was neither one of failure to provide a safe place nor a safe appliance. See also *Webber v. Piper*, 109 N. Y. 496, 17 N. E. 216; *Butler v. Townsend*, 126 N. Y. 105, 26 N. E. 1017.

cause, it constructed its double tracks so that for a few feet they were so close that when cars passed at that point a conductor standing on the running-board of one as it was necessary to collect fares, would be struck by the other, and that the conductor was not warned thereof.<sup>24</sup> A street railway company cannot be charged with failure to provide a safe place for the conductor, by reason of a tree close to the side of the car; the location of the tracks being determined, not by the company, but by the selectmen and road commissioners of the town, and it not appearing that the company had any right to remove the tree.<sup>25</sup> Where the rails of a street railway company are being relaid under a permit granted to it, negligence therein is its, so as to make it liable to an employee injured thereby, though the work is being done for it by a contractor.<sup>26</sup> And where usually the company operated two tracks, but at the time of the accident a portion of one of the tracks was torn up for repairs and cars passing in both directions were required to use one track for a short distance, and the rules of the defendant required the motorman and conductor to follow timetables as posted, and stated that they would receive notice of temporary changes in the timetables by notice posted the day before they became effective, and also required the motorman to obey the instructions of the conductor, and the timetables as posted required the run to be made in one hour, but through his conductor the plaintiff had been instructed to make the run in forty-five minutes during certain hours of the night, which schedule was never embodied in the timetables or notice thereof posted, and the plaintiff, while running on the forty-five-minute schedule as directed, came into collision with a work car coming from the opposite direction upon the part of the road where a single track was used, and the operators of the work car testified that they had no notice of the change in schedule, it was contended that the court erred in granting defendant's motion for a nonsuit, and a

24. *True v. Niagara Gorge R. Co.*, 70 App. Div. (N. Y.) 383, 75 N. Y. Supp. 216.

25. *Hall v. Wakefield & S. St. Ry. Co.*, 178 Mass. 98, 59 N. E. 668.

26. *North Chicago St. R. Co. v. Dudgeon*, 184 Ill. 477, 56 N. E. 796; affg. 83 Ill. App. 528. See *Bessemer L. & I. Co. v. Campbell*, 121 Ala. 50, 25 So. 793.

judgment for defendant was reversed.<sup>27</sup> That the superintendent of an electric railway company called to his assistance, for the purpose of replacing a trolley car, the conductor and motorman in charge of another car, does not render the company liable,

**27. Baldwin v. Schenectady Ry. Co.**, 118 App. Div. (N. Y.) 441, 6 St. Ry. Rep. 775, 103 N. Y. Supp. 514. The court said: "Of course as long as defendant operated its cars over double tracks throughout the entire length of its road there was little or no danger of an accident such as the one in question. But when it began to operate its cars in opposite directions over the same track a new situation was created, fraught with additional dangers to its employees. It then became the duty of the defendant to take reasonable precautions to protect its employees commensurate with such unwonted danger. It was incumbent on the defendant either by the promulgation of time tables or by other suitable methods or regulations to operate its cars with a view to the safety of its employees. *Rose v. Boston & Albany R. Co.*, 58 N. Y. 217, 221; *Sletar v. Jewett*, 35 N. Y. 61, 71. In *Hankins v. New York, Lake Erie & Western R. Co.*, 142 N. Y. 421, it is said: 'It is the duty of the master not alone to take reasonable care that the alteration shall be made known to the parties interested, but also to take reasonable care that the variation ordered and by which the trains are run shall not necessarily or probably lead to disaster when obediently carried out. Reasonable care in originating and formulating the order is necessary and is the duty of the master.' In the cases cited variations had been made in the schedule time in particu-

lar instances and for special reasons, but the principle certainly holds good where, as in this case, a permanent change in the schedule had been effected.

"The rules of the defendant as published were all that could be required. The defendant can be subjected to no unfavorable criticism because of the inadequacy of the rules. Its culpability rests in the fact that it disregarded and violated its own rules, if, as the jury might have found, it changed the schedule time of the plaintiff's cars while not publishing such change or giving notice thereof in any manner to its employees. Plaintiff of course knew that no change had been made in the schedule time as published. But he had a right to assume that in some other way the defendant was observing the duty which it owed him. The evidence is that prior to twelve-forty-five in the morning, men with signals were stationed at each end of the single track to guard against just such an accident as this. Plaintiff might properly assume that in some other appropriate way some means were being taken by defendant to protect him from such an accident. During all the time that this car was being run on a forty-five minute schedule the defendant, through its published time tables, was informing its employees that the running time was one hour, and seems to have taken no precaution to counteract the information thus promulgated. We

where the motorman negligently failed to set the brake, so that the car ran down an incline and collided with another car to the injury of an employee.<sup>28</sup> A street railway company is liable for an injury sustained by a conductor who was ordered by the foreman to repair the brake upon a car standing on the track over the pit in the station, which car, while he was at work under it, was run into by another which entered on the track because the switch was left negligently open.<sup>29</sup> A railroad company is not chargeable with the act of a stranger in opening a switch, from which an injury results to an employee of the company.<sup>30</sup> A street railroad company is not guilty of negligence toward a workman employed upon a temporary track in locating such track so close to the girder between the pillars of an elevated railroad structure that one cannot stand between a car passing on the track and such girder, where there is nothing to prevent the workman from stepping to the other side of the track upon the approach of the car.<sup>31</sup> A railroad is not liable for the death of an employee, caused solely by the accumulation of ice or snow on the brake of a car otherwise in good order, after it leaves a yard a short distance from the place of the accident.<sup>32</sup> Assurance by a trackmaster of a street railway company to a workman under his control, to induce the latter to enter a hole which was dangerous while the cable was in operation, that he would order the engineer not to start the cable, is a matter pertaining to the duty of a master to provide a safe place of work, and is not a mere detail of work within the functions of a fellow servant, and the company is liable for the injuries.<sup>33</sup> A corporation engaged in

think the question of defendant's negligence should have been submitted to the jury.

**28.** *Hoover v. Carbon Co. Elec. Ry. Co.*, 191 Pa. St. 146, 43 Atl. 74.

**29.** *Stucke v. Orleans R. Co.*, 50 La. Ann. 188, 23 So. 342.

**30.** *Bennett v. Long Island R. Co.*, 21 App. Div. (N. Y.) 25, 47 N. Y. Supp. 258.

**31.** *Sullivan v. Third Ave. R. Co.*,

19 App. Div. (N. Y.) 195, 45 N. Y. Supp. 1083.

**32.** *Hanrahan v. Brooklyn Elev. R. Co.*, 17 App. Div. (N. Y.) 588, 45 N. Y. Supp. 474.

**33.** *Mullane v. Houston, W. St. & P. Ferry R. Co.*, 21 Misc. Rep. (N. Y.) 10, 46 N. Y. Supp. 957; affg. 20 Misc. Rep. (N. Y.) 434, 45 N. Y. Supp. 1039.

putting in place appliances to move cable cars is liable for injuries to its employee from the running of a car over the line while he was under the track in the performance of his duty, where he acted in reliance upon the statement of the foreman who was superintending the work that no car would pass until a time considerably later than the time of the accident.<sup>34</sup> And where it appeared that the plaintiff engaged in defendant's employ as a carpenter, mounted a ladder in the defendant's car barn while in the course of his employment, and in doing so came in contact with a water pipe on one side and a charged trolley wire on the other; that there was no necessity at the time for a current to be in the wire; that the plaintiff had no warning that one might be, and there were no circumstances requiring him to assume such to be the case, the company was held liable.<sup>35</sup> But the breaking of the crossbeams fastened to the flanges of an elevated railroad while an employee is at work thereon is insufficient to show negligence on the part of the railroad company, unless the exercise of proper care in inspection would have shown the defective nature of the beam, and the want of such care was a failure in the performance of a duty owed by the company.<sup>36</sup> Although a street railroad company is negligent in locating a post very near the track, it is not relatively negligent as to a motorman killed by colliding with such post while riding on the step of the front platform of such car, leaning outward and looking backward underneath the car while under no necessity to be in that position.<sup>37</sup> A street railway company is liable for injuries to a motorman in coupling a street car and a trailer, where no buffers to protect him from injury were provided.<sup>38</sup> An employer is not negligent in setting at work on a hay cutter an employee twenty years old, of ordinary intelligence, without warning him of the

**34.** *Floetl v. Third Ave. R. Co.*, 10 App. Div. (N. Y.) 308, 41 N. Y. Supp. 792. *R. Co.*, 9 App. Div. (N. Y.) 129, 41 N. Y. Supp. 128.

**35.** *Cessua v. Metropolitan St. Ry. Co.*, 118 Mo. App. 659, 5 St. Ry. Rep. 619, 95 S. W. 277.

**37.** *Sundy v. Savannah St. R. Co.*, 96 Ga. 819, 23 S. E. 841.

**38.** *Toronto R. Co. v. Bond*, 24 Can. S. C. 715.

**36.** *Stourbridge v. Brooklyn City*

danger and instructing him how to avoid it, where the cutter is the best device possible, and the danger of permitting one's finger to be caught in a tuft of hay about to pass between the knives is perfectly apparent.<sup>39</sup> A street railway company is liable for injuries to a driver from the breaking of a hame strap of poor quality and insufficient for the service, where the company has knowledge of the defect through the foreman of its car barn, who is its representative in that behalf, and through its manager.<sup>40</sup> A street car company is not liable for injuries to a boy in its employ engaged in driving horses attached to a car, by his falling upon the track owing to the horses and those of a team met becoming excited, and the negligence of a motorman handling such car, where he was not required or expected to ride upon the car and the lines were not defective for driving, and it had no notice or knowledge that the horses were likely to become excited.<sup>41</sup> An employer is not liable for an injury to an employee resulting from a collision between its trains during a fog, although a better system for giving signals during fogs is in existence, where the one employed by it is reasonably safe.<sup>42</sup> A street railway company is liable for injuries to a gripman from defective appliances upon a car of which the wrecking crew has taken possession, and which he is ordered to continue to operate.<sup>43</sup>

### § 436. Injury to employee while being transported by employer.

— The authorities seem to be at variance in regard to the liability of a railroad company for injuries to its employees while being transported upon its cars to and from their place of employment. The rule in New York seems to be that an employee traveling from his home to his post of duty and back upon the cars of the company free of charge, as stipulated for in the contract of service, is not a passenger, and the company is not liable for his death,

**39.** *Stuart v. West End St. R. Co.*, 163 Mass. 391, 40 N. E. 180.

**40.** *Toledo Consol. St. R. Co. v. Yunker*, 9 Ohio C. C. 262.

**41.** *Consol. St. R. Co. v. Maier*, 9 Ohio C. C. 268.

**42.** *Kemerer v. Manhattan R. Co.*, 81 Hun (N. Y.) 444, 31 N. Y. Supp. 82, 63 St. Rep. (N. Y.) 323.

**43.** *West Chicago St. R. Co. v. Dwyer*, 57 Ill. App. 440.

caused while so traveling by the negligence of a co-employee.<sup>44</sup> It has, however, been held in that State that a railroad employee who is ordered to go to a certain point on the railroad, and travels thither on an employee's pass, is during the trip a passenger, but where, without orders, he leaves the passenger car and enters the cab of the engine, where he is killed by a collision, defendant is not liable, it appearing that no one in the passenger car was injured; and that it is immaterial that the engineer, who did not know that decedent was in the cab until the train was in motion, gave him instructions as to the duties which he was going to perform.<sup>45</sup> In Massachusetts a rule similar to that in New York seems to be sustained by the earlier cases.<sup>46</sup> And in that State, in an action for damages for injuries to plaintiff's intestate, where it appeared that the deceased with others was employed by the defendant to construct a portion of its railway tracks, that defendant furnished a car to carry them to and from the place where they were working, free of charge, and that on the day of the accident plaintiff's intestate boarded such car to return home, and the motorman allowed the same to run with great speed down a grade to a curve where it collided with a dump cart, in which collision the deceased received his injuries, it was decided that the plaintiff's intestate was not a passenger, but was a fellow servant of the motorman whose negligence was complained of, and that the plaintiff could not recover.<sup>47</sup> But it has also been held

**44.** *Vick v. New York Cent. R. Co.*, 95 N. Y. 267, 47 Am. Rep. 36; *Russell v. Hudson R. Co.*, 17 N. Y. 134; *Ross v. New York Cent. & H. R. R. Co.*, 5 Hun (N. Y.) 488; *affd.*, 74 N. Y. 617.

**45.** *McGucken v. Western N. Y. & P. R. Co.*, 77 Hun (N. Y.) 69, 28 N. Y. Supp. 298. Where a railroad company gives orders by telegraph for the running of its trains, the telegraph operator and engineers are not deemed co-employees, and the company is liable for the death of an engineer, occasioned by the negligence

of a telegraph operator in transmitting an order. *Dana v. New York Cent. R. Co.*, 23 Hun (N. Y.) 473. See *Ewald v. Chicago & N. W. Ry. Co.*, 70 Wis. 420, 5 Am. St. Rep. 178, 36 N. W. 12, 591; *Kansas Pac. Ry. Co. v. Salmon*, 11 Kan. 83.

**46.** *Gilman v. Eastern R. Co.*, 10 Allen (Mass.) 233, 87 Am. Dec. 635; *Seaver v. Boston & M. R. Co.*, 14 Gray (Mass.) 466; *Gillshanan v. Stormy Brook R. Corp.*, 10 Cush. (Mass.) 228; *O'Brien v. Boston & A. R. Co.*, 138 Mass. 387, 52 Am. Rep. 379.

**47.** *Kilduff v. Boston Elev. Ry.*

in that State that a monthly ticket which was given by the railroad corporation to an employee entitling him during the month to a certain number of rides from one place to another, either on business or for his own pleasure, forms part of the consideration by which he is induced to enter and continue in the employment of the corporation, and is not a mere gratuity, and the company was, therefore, liable for the negligence of its servants causing his death.<sup>48</sup> The authorities in some of the other States sustain the rule above stated,<sup>49</sup> while in others a contrary rule is maintained,<sup>50</sup> and it has been decided that where a railroad, according to custom,

Co., 195 Mass. 307, 5 St. Ry. Rep. 427, 81 N. E. 191.

**48.** *Doyle v. Fitchburg R. Co.*, 166 Mass. 492, 44 N. E. 611, 33 L. R. A. 844.

**49.** *Wright v. Northampton & H. R. Co.*, 122 N. Car. 852, 29 S. E. 100; *Ionone v. New York, N. H. & H. R. Co.*, 21 R. I. 452, 44 Atl. 592, 79 Am. St. Rep. 812, 46 L. R. A. 730.

Under the facts of the case held to be an employee and not a passenger. *Birmingham Ry., L. & P. Co. v. Sawyer*, 156 Ala. 199, 6 St. Ry. Rep. 765, 47 So. 67.

**50.** *Fitzpatrick v. New Albany & S. R. Co.*, 7 Ind. 436; *New York, L. E. & W. R. Co. v. Burns*, 51 N. J. L. 340, 17 Atl. 630; *McNulty v. Pennsylvania R. Co.*, 182 Pa. St. 479, 38 Atl. 524, 38 L. R. A. 376; *Chattanooga R. T. Co. v. Venable*, 105 Tenn. 460, 58 S. W. 861, 51 L. R. A. 886; *O'Donnell v. Alleghany Val. R. Co.*, 59 Pa. St. 239, 98 Am. Dec. 336, where a carpenter employed by a railroad company in the construction of a bridge several miles from the place where he lived and as part consideration for his services received transportation to and from his place of employment without compensation, the employees of the train were not

his fellow servants, and the company was not liable to him for injuries sustained through their negligence; *Galveston, H. & S. A. Ry. Co. v. Crawford*, 9 Tex. Civ. App. 245, 27 S. W. 822, 29 S. W. 958, a conductor riding in a cab, in obedience to an order of the company to report for duty at a certain place, and the engineer of the train upon which he was riding were not fellow servants; so also as to a laborer on a construction train when riding from one place of work to another; *Knahtla v. Oregon Short Line & U. N. Ry. Co.*, 21 Oreg. 136, 27 Pac. 91; *Manville v. Cleveland & T. R. Co.*, 11 Ohio St. 417; *Lake Shore & M. S. Ry. Co. v. Man*, 9 Ohio C. C. 173; *Gillenwater v. Madison & I. R. Co.*, 5 Ind. 340, 61 Am. Dec. 101; *Toledo, etc., Ry. Co. v. O'Connor*, 77 Ill. 391; *Central R. Co. v. Henderson*, 69 Ga. 715; *State v. Western Md. R. Co.*, 63 Md. 433. Where plaintiff and other workmen were constructing a trolley line at some distance from town, and the company employing them furnished a team and wagon to transport them to and from their work, they were employees and not passengers while so riding. *Bowles v. Indiana Ry. Co.*, 62 N. E. 94, 27 Ind. App. 672.

carries an employee to his work without payment of fare, such employee, not being on the train in the line of his duty, is a passenger, and, on proof of injuries received while so riding, negligence will be inferred from the collision which injured him,<sup>51</sup> and that the fact that an employee of defendant was riding on one of its cars under a rule of defendant allowing employees to ride at any time free of charge did not deprive him of the rights of a passenger.<sup>52</sup> So, in a recent case it is declared that where an employee receives a pass from a railway company, not as a gratuity, but as a part of the consideration for his services, he is, when riding upon such pass, a passenger for hire, so that the provisions of the pass waiving the right to damages for negligence, are void as against the public policy; he is a passenger ever though, after boarding the train, he was traveling on the time of the company.<sup>53</sup> And in a case in Colorado it is held that a street railway

**51.** *Rapid Transit Co. v. Venable*, 105 Tenn. 460, 58 S. W. 861, 51 L. R. A. 886; *O'Donnell v. Alleghany Val. R. Co.*, 59 Pa. St. 246; *Fitzpatrick v. New Albany, etc., R. Co.*, 7 Ind. 436; *McNulty v. Pennsylvania R. Co.*, 182 Pa. St. 479, 38 Atl. 524, 38 L. R. A. 376, 41 W. N. C. 105, 28 Pittsb. L. J. N. S. 149; *Railroad Co. v. Burns*, 51 N. J. 340; *State v. Western Md. R. Co.*, 63 Md. 433.

**52.** *Dickenson v. West End St. Ry. Co.*, 177 Mass. 365, 52 L. R. A. 326, 59 N. E. 60; *Simmons v. Oregon R. Co.*, 41 Oreg. 151, 69 Pac. 440, 1022.

**53.** *Harris v. Puget Sound Electric Ry.*, 52 Wash. 289, 6 St. Ry. Rep. 674, 100 Pac. 838. The court said: "One of the principal issues in the case was whether the pass was a mere gratuity from the appellant to the deceased, or whether it was given upon consideration of the hire of deceased and as a part consideration for his wages. This question was submitted to the jury, and we must

now, in view of that issue and of the finding of the jury, necessarily conclude that the pass was not a gratuity, but was a part consideration for the wages of the deceased. In a note found on page 557, 4 Am. & Eng. Ann. Cas., the rule is thus stated: 'The decisions are not in harmony as to the effect to be given to a provision in a free pass exempting the carrier from liability for injuries caused by its negligence or that of its servants. According to one view, such an exemption is contrary to public policy, and not enforceable.' As sustaining this view, a number of cases are cited, among them *Mobile, etc., R. Co. v. Hopkins*, 41 Ala. 486, 94 Am. Dec. 607; *Rose v. Des Moines Valley R. Co.*, 39 Iowa 246; *Jacobus v. St. Paul, etc., R. Co.*, 20 Minn. 125 (Gil. 110), 18 Am. Rep. 360, and other cases. The note then continues: 'In other jurisdictions the view is taken that there is no violation of law or public policy by an agreement on the

employee who, after a day's work, is with others directed by the foreman to go home upon the street cars because of the absence of a hand car by which they are usually transported home, is a passenger, and not a trespasser, while riding on the motor because the street car is filled with passengers, so as to prevent a recovery for personal injuries sustained by the company's negligence, although he was not required to pay any fare.<sup>54</sup> And in a case in Missouri where an employee sued for an injury sustained while riding on a laborer's free pass, it was held that as he was not associated with defendant's motorman in running the car, and his employment was in nowise connected with the operation of the cars, he was not a fellow servant of the motorman, but his relation to the company was that of a passenger to whom it owed the same degree of care as to any other passenger.<sup>55</sup> Again, in a case in Indiana, where an employee was injured while riding home on one of defendant's cars after finishing his day's work, and it appeared that he was riding on a ticket given him by defendant's foreman for that purpose, in accordance with defendant's custom,

part of the passholder that the carrier shall not be liable for injuries caused to him by its negligence or that of its servants.' In support of this rule are cited a number of cases, among which are *N. P. R. Co. v. Adams*, 192 U. S. 440, 24 S. Ct. 408, 48 L. ed. 513; *Boering v. Chesapeake Beach R. Co.*, 193 U. S. 442, 24 S. Ct. 515, 48 L. ed. 742; *Payne v. Terre Haute R. Co.*, 157 Ind. 616, 62 N. E. 472, 56 L. R. A. 472; *Rogers v. Kennebec Steamboat Co.*, 86 Me. 261, 29 Atl. 1069, 25 L. R. A. 491, and other cases. This court in *Muldoon v. Seattle City Rd. Co.*, 7 Wash. 528, 35 Pac. 422, 22 L. R. A. 794, 38 Am. St. Rep. 901, and *Id.*, 10 Wash. 311, 38 Pac. 995, 45 Am. St. Rep. 787, held to the last-named rule, where the pass was a mere gratuity. But in *Peterson v. Seattle Traction Co.*, 23 Wash. 615, 645, 65 Pac. 543, 53 L. R. A. 586,

we said: 'But we expressly hold that, if the respondent's transportation constituted a portion of the consideration for his services, he became a passenger for hire, just the same as anybody else who parts with anything of value for transportation.' It follows from this rule and from the finding of the jury that the transportation in this case was not a gratuity, but constituted a part consideration for the deceased's services; that the deceased was a passenger for hire, and entitled to protection as such passenger, which public policy does not permit him to waive." *Per MOUNT, J.*

54. *Denver & B. P. Rapid T. Co. v. Dwyer*, 20 Colo. 132, 36 Pac. 1106.

55. *Haas v. St. Louis & S. Ry. Co.*, 111 Mo. App. 706, 5 St. Ry. Rep. 614, 90 S. W. 1155.

that he did not pay any thing for such ticket; that it was no part of his contract of employment, or any other contract; that it was customary to issue such tickets for other reasons than the transaction of business of the company; that he was not bound to use the ticket at any particular time or on any particular car; that he was not in any way doing work for defendant, but was simply riding on said car for his own convenience, in the same manner as any other passenger, such facts were held not to be in irreconcilable conflict with a general verdict finding that such person was a passenger.<sup>56</sup> In a case in Rhode Island also, where plaintiff was a flagman in defendant's employ, under a contract to receive for his services each week the sum of eight dollars and fourteen transportation tickets, good on defendant's road, he was held to be a passenger and not an employee of defendant while riding home at night on one of these tickets, after his day's work was fully completed.<sup>57</sup> When there is a question whether an employee re-

**56.** *Indianapolis Traction & Term. Co. v. Romans*, 40 Ind. App. 184, 5 St. Ry. Rep. 219, 79 N. E. 1068, wherein it is said that numerous cases decided on facts analogous to the above would warrant the conclusion that he was a passenger. Citing *Dickinson v. West End St. Ry. Co.*, 177 Mass. 365, 59 N. E. 60, 83 Am. St. Rep. 284, 59 L. R. A. 326; *Peterson v. Seattle Traction Co.*, 23 Wash. 615, 63 Pac. 539, 65 Pac. 543, 53 L. R. A. 586; *Chattanooga Rapid Transit Co.*, 105 Tenn. 460, 58 S. W. 861, 51 L. R. A. 886; *Doyle v. Fitchburg R. Co.*, 162 Mass. 66, 37 N. E. 770, 25 L. R. A. 157, 44 Am. St. Rep. 335; *Doyle v. Fitchburg R. Co.*, 166 Mass. 492, 44 N. E. 611, 33 L. R. A. 844, 55 Am. St. Rep. 417; *Louisville & N. R. Co. v. Weaver*, 108 Ky. 392, 56 S. W. 674, 50 L. R. A. 381; *State, etc., v. Western Maryland, etc., R. Co.*, 63 Md. 437; *Whitney v. New York, N. H. & H. R. Co.*, 102 Fed. 850, 43 C.

C. A. 19, 50 L. R. A. 615; *Williams v. Oregon Short Line R. Co.*, 18 Utah 210, 54 Pac. 991, 72 Am. St. Rep. 777; *McDaniel v. Highland R. Co.*, 90 Ala. 64, 8 So. 41.

**57.** *Enos v. Rhode Island Suburban Ry. Co.*, 28 R. I. 291, 5 St. Ry. Rep. 820, 67 Atl. 5.

In another case in Rhode Island where the plaintiff, an employee of defendant, after cleaning a switch, boarded a car to proceed to another switch to continue his work as switch cleaner, and gave the conductor an employee's ticket, furnished him by the company, and before reaching his destination was injured by a collision between the car on which he was riding and another car of the defendant, it was declared, on appeal from a nonsuit ruling, that he was traveling to perform his customary work at the time of the accident and clearly sustained the relation of an employee rather than that of passenger.

ceived a pass as a gratuity, or as a part consideration for his services it is proper to prove, as a matter of custom, that the railroad furnishes transportation to other employees and that its manager stated that such transportation was a part of the consideration for the services.<sup>58</sup>

§ 437. **Injury to employee not on duty.**—The rule that the master is not liable for an injury to a servant caused by the negligence of a fellow servant is not applicable to a case where the servant injured was not at the time of the injury acting in the service of the master.<sup>59</sup> An employee of a street railway company in walking beside the track in the usual manner on his way to work is not a trespasser.<sup>60</sup> Where the plaintiff's intestate was an employee of the defendant, and on the day of the accident, after the completion of his labors, he attempted to cross the track of defendant and was struck by a construction train which was coming backward, it was held that since he was not at that time engaged in the performance of any work for defendant, he was not then in its employ so as to make him a fellow servant of the employees operating the train.<sup>61</sup> In some States, however, a contrary rule to that above stated is held. For example, where the plaintiff was injured by being jammed between two cars while going along a beaten path, accustomed to be kept open between such cars, which path had been used for a long time prior thereto by the company's employees, and over which he was walking in order to commence his usual duties as an engine wiper for the company, it was held that he was a fellow servant of those in the

*Shannon v. Union R. R. Co.*, 27 R. I. 475, 5 St. Ry. Rep. 828, 63 Atl. 488.

**58.** *Harris v. Puget Sound Electric Ry.*, 52 Wash. 289, 6 St. Ry. Rep. 674, 100 Pac. 838.

**59.** *Dickenson v. West End St. Ry. Co.*, 177 Mass. 365, 52 L. R. A. 326, 59 N. E. 60; *Washburn v. Nashville & C. R. Co.*, 3 Head (Tenn.) 638, 75 Am. Dec. 784; *Sullivan v. New York,*

*N. H. & H. R. Co.*, 73 Conn. 203, 47 Atl. 131, where deceased, a section foreman of the company, was injured after working hours while on a crossing.

**60.** *Birmingham Ry., L. & P. Co. v. Williams*, 158 Ala. 381, 48 So. 93.

**61.** *Columbus & T. R. Co. v. O'Brien*, 4 Ohio C. C. 515. See also *Baltimore & O. R. Co. v. State*, 33 Md. 542; *Chicago, M. & St. P. Ry.*

management of the train, whose negligence caused the injury, and that he could not recover therefor.<sup>62</sup>

§ 438. **Electrical apparatus and structures.** — It is well settled that the degree of care required of an employee is measured by the danger of the forces employed. So that what would be sufficient care and foresight in one case would, perhaps, be utterly inadequate in another; and, while generally the law requires simply reasonable care and foresight by the employer in the selection and provision of appliances for the use of the employee, that care and prudence must be proportioned to what may properly be expected of him under the circumstances, and increases in a corresponding ratio with the danger and hazard necessarily connected with the use of the appliances.<sup>63</sup> A company operating an electric street railway is guilty of gross negligence toward a lineman in failing to insulate a "span" wire which is so located as to render it liable to come in contact with the trolley wire and become charged with electricity, exposing those who touch it to death or serious injury. A trolley wire, as used by a street railway company, is charged with an agency of exceeding danger to life, and is capable of communicating such deadly quality to any wire or conductor of electricity that may come in contact with it. When a corporation is authorized to use such an agency in the public streets, the law implies a duty of using a very high degree of care in the construction and operation of the appliances for the use of that agency, requiring the corporation to employ every reasonable precaution known to those possessed of the knowledge and skill requisite for the safe treatment of such an agency, for providing against all dangers incident to its use, and holds it accountable for the injury of any person due to the neglect of that duty, whether the person injured is or is not one of its own em-

Co. v. Ross, 112 U. S. 377, 5 S. Ct. 184, 28 L. ed. 787.

62. Ewald v. Chicago N. W. Ry. Co., 70 Wis. 420, 36 N. W. 12, 5 Am. St. Rep. 178. See also International & G. N. R. Co. v. Ryan, 82 Tex. 565,

18 S. W. 219; St. Louis A. & R. Ry. Co. v. Welsh, 72 Tex. 298, 10 S. W. 529, 2 L. R. A. 839.

63. Harroun *et al.* v. Brush Elec. L. Co., 12 App. Div. (N. Y.) 126 42 N. Y. Supp. 716, 6 Am. Electl. Cas.

employees.<sup>64</sup> Each of several electric companies which by agreement occupy a common pole to support their wires owes the duty to take all reasonable precautions to prevent injury to the servants of any of the others who may be sent there in pursuance of the common right; and this duty is not so circumscribed that it ceases to exist if a servant of one company happens to rest a hand or a foot upon a crossarm belonging to another company, or to touch its wires.<sup>65</sup> An electric railway company is guilty of negligence in causing to be used a car which, by reason of the worn-out condition of the electrical fields, has frequently stopped suddenly and as suddenly started up, where no proper care has been exercised in renewing the fields or proper tests applied to ascertain their condition, since it is bound to know that, with a low dashboard in front, the inevitable result of such action of the car will be to suddenly hurl the motorman upon the ground in front of the car and greatly to imperil his life.<sup>66</sup> Where the employee of a railway construction company was at work on top of a tower wagon on the tracks of a street railway company over which its cars were running, necessitating the frequent removal of the wagon from the tracks, by reason of which plaintiff was injured, it was the duty of the construction company to use ordinary care to prevent injury to plaintiff while at work on the tower wagon by so protecting the wagon that it would not have been necessary to remove it while he was at work without notice or warning.<sup>67</sup> As to the effect of the doctrine of *res ipsa loquitur* upon the liability of an electric railroad company for injury to its employees through the use of electricity used as a motive power, the courts have not clearly determined.<sup>68</sup> But where a workman on an elevated

357; Atlanta Consol. St. Ry. Co. v. Owings, 97 Ga. 663, 25 S. E. 377, 33 L. R. A. 798, 6 Am. Electl. Cas. 271.

64. McAdam v. Central Ry. & Elec. Co., 67 Conn. 445, 35 Atl. 341, 6 Am. Electl. Cas. 348, 5 Am. & Eng. R. Cas. N. S. 7.

65. Newark Elec. L. & P. Co. v. Garden, 78 Fed. 74, 37 L. R. A. 725, 6 Am. Electl. Cas. 275.

66. Beardsley v. Minneapolis St. R. Co., 54 Minn. 504, 56 N. W. 176.

67. North American Ry. Const. Co. v. Patry, 10 Kan. App. 55, 61 Pac. 871.

68. See Lincoln St. R. Co. v. Cox, 48 Neb. 807, 67 N. W. 740, 6 Am. Electl. Cas. 352; Kraatz v. Brush Elec. L. Co., 82 Mich. 457, 46 N. W. 787, 3 Am. Electl. Cas. 491; Clark v.

structure, with his tools in close proximity to wires used for the purpose of carrying the charge for the operation of the railway by the third-rail system, was injured by a discharge of electricity therefrom, and it was shown that the wires were sufficiently insulated when put in, a comparatively short time before, and frequently and regularly inspected by a competent person, the last inspection having taken place but a few days before, it was held that the doctrine of *res ipsa loquitur* did not apply.<sup>69</sup> And where plaintiff, a man of at least ordinary intelligence, an instructed and experienced motorman, was injured while operating an electric car for the defendant at a terminal where the cars turned round a loop, and the car ran upon the curve of the loop at full speed and was derailed and capsized, and thereby plaintiff received the injuries here complained of, and the issue was whether a shock of electricity, passing through him from his left hand, on the handle of the controller, and through his foot, resting upon a metallic part of the car, produced temporary paralysis, by reason of which he was deprived of control of his car, it was held that the presumption of negligence conceded was rebutted by affirmative testimony, *inter alia*, as to the safe use of the car for twenty days before and months after the occurrence of the accident, during which the car was shown to have been in the same condition as at the time of the accident, and by the facts shown as to its purchase and inspection.<sup>70</sup> The measure of the defendant's obligation to an employee of a contractor who had entered into a contract to paint the poles of defendant's trolley system, for an injury caused by his coming in contact with an electric feed wire while sandpapering one of such poles, has been held to be that of reasonable care under the circumstances to protect the workman from injury.<sup>71</sup>

Nassau Elec. R. Co., 9 App. Div. (N. Y.) 54, 41 N. Y. Supp. 78.

69. Carey v. Manhattan Ry. Co., 50 Misc. Rep. (N. Y.) 335, 5 St. Ry. Rep. 760, 98 N. Y. Supp. 668.

70. Jenkins v. St. Paul City Ry. Co., 105 Minn. 504, 6 St. Ry. Rep. 616, 117 N. W. 928.

71. Kennedy v. Westchester Elec. Ry. Co., 1 St. Ry. Rep. 639, and notes 86 App. Div. (N. Y.) 293, 83 N. Y. Supp. 823; Wells v. Brooklyn H. R. Co., 67 App. Div. (N. Y.) 212, 74 N. Y. Supp. 196.

§ 439. **Defective appliances.** — A master is not liable to a servant for an injury to the latter caused by the breaking of a tool or appliance in consequence of a latent defect in the material, where the evidence shows that the material furnished by the master for the manufacture of the appliance, and out of which it was made, was proper; that there was nothing in its appearance to indicate inefficiency, and that it was made by competent and skilled workmen, and was subjected to frequent and thorough inspection of such a character as to reveal any flaw or defect that could be discovered in that way.<sup>72</sup> So, where a motorman was injured by the plow of the car catching in the slot rail, and it appeared from the evidence that for a distance of about two and a half feet at the place of the accident the opening was only about half an inch, while at other points it was about three-quarters of an inch, and the plow which was inserted in the slot rail was about half an inch in width, it was held by the court that there was no actionable negligence on the part of the company.<sup>73</sup> Where even if

**72.** *Smith v. New York Cent. & H. R. Co.*, 164 N. Y. 491, 58 N. E. 655; revg. 33 App. Div. (N. Y.) 628, 53 N. Y. Supp. 1115; *Carlson v. Phoenix Bridge Co.*, 132 N. Y. 273, 30 N. E. 750; affg. 55 Hun (N. Y.) 485, 8 N. Y. Supp. 634.

**73.** *McCann v. Interurban St. Ry. Co.*, 117 App. Div. (N. Y.) 188, 6 St. Ry. Rep. 774, 102 N. Y. Supp. 296. The court said: "Where is the actionable negligence? What man of ordinary prudence and care, looking upon this alleged defect, would anticipate the accident, or one of a similar character? Actionable negligence is not predicated upon what we might see could have been done to prevent the accident, after the accident had happened, but upon the degree of care which ordinarily prudent men, looking at the situation before the accident had happened, would say was likely, in the exercise of ordinary

care, to occur. And, in the light of this evidence, what man of ordinary care, knowing the equipment of these cars, and looking at this alleged defect, would anticipate that it would result in causing a sudden stopping of a car and producing injury? The plaintiff had had twenty-five years' experience in running cars, and several years as a motorman; but it does not appear to have suggested itself to his mind that the slot rails were out of order until several hours after the accident, and then he was obliged to leave his car to discover the defect; and the defect, if it in fact existed, was so slight that the plaintiff tells us it would not have jarred a heavy car, while his own car appears to have been operated through the same place all during the day, and to have been started without difficulty (for none is suggested) from the very point where it came to

the accident may be evidence of a defect somewhere, the cause of the accident remains wholly a matter of conjecture, and no one can say in the absence of explanation, either from common experience or otherwise, that it happened through the fault of the defendant, the doctrine of *res ipsa loquitur* does not apply. So, where the conductor was killed by the sudden starting of the car while he was standing on the fender adjusting the trolley, and there was no evidence as to the cause of the car so starting, the company was held not liable.<sup>74</sup> And where plaintiff was employed as a lineman by defendant, and while fastening a charged span wire into an insulated coupling, which proved defective, received an electric shock, and it was not shown that the defendant had made any test of the coupling, though it was practicable to make such tests, but the defendant's president testified that all the couplings were purchased from a respectable manufacturer, who had agreed to make an inspection in the factory before delivery, it was held sufficient to go to the jury on the question as to whether reasonably safe appliances had been furnished by the defendant.<sup>75</sup> An employee

a sudden standstill. Assuming, as we may, in the light of the verdict of the jury, that this accident resulted from the closing up of the slot, the facts do not justify the conclusion of negligence on the part of the defendant. If the slot had been one-sixteenth of an inch wider than it was, or if the plow which was in use had been worn slightly, an accident such as is described could not have happened, and to say that the defendant owed a degree of care which should have discovered and remedied so slight a defect—that it should, in the exercise of reasonable care, have anticipated that the defect would result in this or a similar accident—is carrying the doctrine of negligence to the point of absurdity.”

**74.** *Curtin v. Boston Elevated Ry. Co.*, 194 Mass. 260, 5 St. Ry. Rep. 434, 80 N. E. 522.

**75.** *Murphy v. Coney Island & B. R. Co.*, 65 App. Div. (N. Y.) 546, 73 N. Y. Supp. 18; *Byrne v. Eastmans Co.* of New York, 163 N. Y. 461, 57 N. E. 738; revg. 27 App. Div. (N. Y.) 270, 50 N. Y. Supp. 457; *Wagner v. Brooklyn H. R. Co.*, 69 App. Div. (N. Y.) 349, 74 N. Y. Supp. 809, when plaintiff, an experienced lineman of the New York police department, was injured in the discharge of his duty in repairing a police telegraph wire which was carried upon the structure of defendant elevated railroad company, which charged the city rent for the privilege of stringing such wires upon its structure, the injury being alleged to have been caused by a shock from a current of electricity escaping from defendant's trolley feed wire by reason of defendant's negligence in allowing such wire to become uninsulated and defective; it was held that

of a street railroad company is not required to make a critical examination of appliances, or to entertain doubts as to the cars being properly equipped; and he can properly assume, unless he knows or should know otherwise, that the means provided by the employer for operating the cars are safe and sufficient. He is not bound to know that the safe operation of his car requires more assistance; but it is the duty of the employer, the carrier, to supply, not only proper and safe machinery and appliances for operating the car, but sufficient skilled help for its safe operation.<sup>76</sup> In a case in Missouri the following instruction was sustained: "If the jury find from the evidence that the car mentioned was in a defective condition, as set forth or mentioned in the other instructions, and if the jury find from the evidence that the plaintiff knew of said defective condition of said car before his said injury, yet, unless the jury find from the evidence that the danger from said car and its defective condition was so glaring as to threaten immediate injury, or such that a person of ordinary prudence would not have used it to ride upon, then the fact that the plaintiff knew of such defective condition of said car, and remained in the service of the defendant thereafter, will not of itself preclude a recovery in this case."<sup>77</sup> The duty of an employer who keeps a boiler in a building in which employees are at work is to use such reasonable care to inspect it from time to time as may be necessary to enable him to see that it is in a reason-

the care which defendant was bound to exercise included ordinary and reasonable insulation of its wires, and ordinary and reasonable inspection, and that whether defendant had used ordinary care in the premises was properly submitted to the jury. The improper adjustment of a brake rod constitutes an improper appliance and not a mere neglect or failure in detail, within the rule relating to the liability of the master for defects in appliances, where it was the duty of inspectors to make the adjustment, and not the duty of the train em-

ployees. *Woods v. Long Island R. Co.*, 11 App. Div. (N. Y.) 16, 42 N. Y. Supp. 140.

**76.** *Windover v. Troy City Ry. Co.*, 4 App. Div. (N. Y.) 202, 38 N. Y. Supp. 591, 6 Am. Electl. Cas. 381; *Cook v. St. Paul, etc., R. Co.*, 34 Minn. 45; *Flike v. Boston, etc., R. Co.*, 53 N. Y. 549; *Whittaker v. Delaware & H. C. Co.*, 126 N. Y. 544 27 N. E. 1042.

**77.** *Clippard v. St. Louis Transit Co.*, 202 Mo. 432, 5 St. Ry. Rep. 622, 101 S. W. 44.

ably safe condition and free from defects rendering it unsafe for use, although such employees are not called upon to work at the boiler, or to do any work connected with it, and a careless or negligent inspection by a competent inspector does not relieve a master from liability for a defect not discovered by such inspector.<sup>78</sup> But a street car company is not chargeable with negligence in permitting a switch leading to the car barn to be open, whereby a passing car was derailed, and the driver killed, where it appears that the switch was in good order, and of the kind generally used by other companies; that it was only open in the morning to let cars out of the barn, and in the evening to let them in; that during the day it was securely fastened with an iron plug; that the cars had been passing it every three minutes during the day of the accident, and there was no evidence to show how the switch was opened.<sup>79</sup>

**§ 440. Delegation of master's duty.** — A master cannot delegate the duty of inspecting appliances furnished his servants, so as to escape liability for negligence in making such inspection, nor can he shift upon his employees his responsibilities for injuries to them from defects in appliances from wear and tear, by devolving upon them the duty of inspection, without giving them time and opportunity to make such inspection as would reveal the defects.<sup>80</sup> A street railway company sending an employee to remedy a defect, on notice at an office of the company that the brake on a car does not work properly, cannot relieve itself from liability for an injury to an employee caused by such defect, on the ground that notice was not properly brought to the attention of the company, where the employee sent to make the repairs stated that the car was safe after making insufficient repairs.<sup>81</sup> The duty of inspec-

**78.** *Egan v. Dry Dock, E. B. & B. R. Co.*, 12 App. Div. (N. Y.) 556, 42 N. Y. Supp. 188.

**79.** *Donnelly v. New York & H. R. Co.*, 3 App. Div. (N. Y.) 408, 38 N. Y. Supp. 709, 74 St. Rep. (N. Y.) 169. A broncho which will kick when struck is a defective, and in some

cases a dangerous, appliance in the propelling power of a street car to which it is attached. *Leigh v. Omaha St. R. Co.*, 36 Neb. 131, 54 N. W. 134.

**80.** *McKnight v. Brooklyn H. R. Co.*, 23 Misc. Rep. (N. Y.) 527, 51 N. Y. Supp. 738.

**81.** *Kingan v. Pittsburg Trac. Co.*,

tion resting upon a master who keeps a boiler in a building in which servants are engaged is a personal one, and cannot be delegated so as to relieve him from the consequences of improper inspection.<sup>82</sup> A street railway company cannot discharge itself from the consequences of failure to perform its duty toward its employees to furnish adequate brakes for its cars and to keep them in proper order by directing its servants or agents to perform the same, on the ground that such failure is due to the negligence of fellow servants.<sup>83</sup> A railway company cannot relieve itself of liability to an employee for injuries caused by supplying defective cars and a track defective in materials and construction, on the ground that it intrusted such duties to the fellow servants of such employee.<sup>84</sup> And in an action for personal injuries sustained by a motorman in a collision the evidence tended to show that plaintiff's car proceeded on its route followed by another car which was not provided with a red light on the rear end thereof because of the failure of the conductor of the latter car to attach such a light at a point on the company's lines where such lights were provided. On the return journey the latter car preceded plaintiff, and owing to the lack of a red light in the rear and the slipping of the trolley pole from the wire, causing the car to be at a standstill and to be enshrouded in darkness, plaintiff did not observe the car which preceded him and a collision occurred, injuring the plaintiff. Evidence was also introduced which tended to show that if the car had been properly provided with a rear-end light the accident would not have occurred. It was held that the duty of the railway company of actually equipping its cars with red lights for use after dark was an imperative duty which it could not delegate so as to escape liability for injuries suffered by its servants by reason of the omission or neglect

5 Pa. Super. Ct. 436, 28 Pittsb. L. J. N. S. 128, 41 W. N. C. 63.

**82.** Egan v. Dry Dock, E. B. & B. R. Co., 12 App. Div. (N. Y.) 556, 42 N. Y. Supp. 188.

**83.** McNamara v. Brooklyn City R.

Co., 11 Misc. Rep. (N. Y.) 667, 66 St. Rep. (N. Y.) 361, 32 N. Y. Supp. 913.

**84.** Louisville, E. & St. L. Consolidated R. Co. v. Miller, 140 Ind. 685, 40 N. E. 116.

on the part of the servant or agent intrusted therewith, and that plaintiff was entitled to recover for his injuries.<sup>85</sup>

**§ 441. Vice-principals and other representatives of master.**— Where a foreman in charge of men at work cleaning cars on a side track put deceased at work under a certain car, and then brought other cars onto the track to be cleaned, handling them himself, and in such a way as to cause a collision and the death of deceased, though he was a fellow servant in moving the cars onto the track, he was a vice-principal in determining that it should be done, and his omission to warn deceased was the omission of the master, making it liable.<sup>86</sup> Where an order was given by a car dispatcher to a conductor over a telephone, which order was repeated by the conductor to the dispatcher, it was competent, over objection to the same as hearsay, to prove the words spoken at each end of the line by witnesses who were present at each end and heard the words spoken.<sup>87</sup>

**§ 442. Selection, employment, and retention of employees.**— A master owes the duty to his employees to use ordinary care in the selection, employment, and retention in service of fellow servants in order to ascertain their competency and fitness for the services to be performed by them.<sup>88</sup> The degree of care to be used is determined by the character of the service in which the employee is to be engaged. If the employment is such as to endanger the life and limb of co-employees, the master, upon engaging such servant, is required to make reasonable investigation into his character, skill, and habits of life, and his failure

**85.** *Carter v. McDermott*, 35 Wash. L. Rep. 158, 5 St. Ry. Rep. 72.

**86.** *Metropolitan West Side El. R. Co. v. Skola*, 83 Ill. App. 659; *affd.*, 183 Ill. 454, 56 N. E. 171.

**87.** *Edge v. Southwest Missouri Elec. Ry. Co.*, 206 Mo. 471, 6 St. Ry. Rep. 106, 104 S. W. 90.

**88.** *Stourbridge v. Brooklyn City*

*R. Co.*, 9 App. Div. (N. Y.) 129, 41 N. Y. Supp. 128; *Tyson v. Southern N. A. R. Co.*, 61 Ala. 554, 32 Am. Rep. 8; *Norfolk & Western R. Co. v. Hoover*, 79 Md. 253, 29 Atl. 994, 47 Am. St. Rep. 392, 25 L. R. A. 710; *Lewis v. Emery*, 108 Mich. 641, 66 N. W. 569; *Caldwell v. Brown*, 53 Pa. St. 453.

to perform this duty is negligence, for which he is liable if injury is occasioned to a co-employee, either by the negligence, incapacity, or intemperance of such servant.<sup>89</sup> The ignorance of the employer as to the incompetency of his employee will not relieve the employer of responsibility where the fact of such incompetency could have been ascertained by proper inquiry.<sup>90</sup> And in an action for an injury to a conductor of defendant, while in the discharge of his duties as such, by a car negligently operated by a motorman on an adjacent parallel track, where the only ground upon which the plaintiff was entitled to have his case submitted to the jury was that of the negligence of an incompetent fellow servant, of whose incompetence defendant had notice, the books of the company containing the records of conductors and motormen, and containing entries as to the alleged incompetent motorman, are admissible not only for the purpose of showing notice to the company of the record but also as *prima facie* evidence of any facts stated therein.<sup>91</sup> Mere incompetence is not alone sufficient to establish the negligence of the employer; it must be shown that the master had knowledge or could by due diligence have acquired such knowledge.<sup>92</sup> The burden of proof is upon the plaintiff to show that the defendant was negligent either in employing or retaining an incompetent servant. The presumption is that the defendant was not negligent. Where the incompetency of an employee has never been reported to defendant and defendant has no reason for knowing of such incompetency, there is no presumption that the defendant knew or ought

**89.** *Williams v. Missouri Pac. Ry. Co.*, 109 Mo. 475, 18 S. W. 1098; *Western Stone Co. v. Whalen*, 151 Ill. 472, 38 N. E. 241, 42 Am. St. Rep. 244.

**90.** *Gilman v. Eastern R. Co.*, 13 Allen (Mass.) 433, 90 Am. Dec. 210; *Davis v. Detroit M. R. Co.*, 20 Mich. 112, 4 Am. Rep. 364.

**91.** *Treud v. Detroit United Ry.*, 149 Mich. 388, 5 St. Ry. Rep. 504, 112 N. W. 977.

**92.** *Sutton v. New York, L. E. & W. R. Co.*, 66 Hun (N. Y.) 632, 21 N. Y. Supp. 312; *Gibson v. Northern Cent. Ry. Co.*, 23 Hun (N. Y.) 289; *Wright v. N. Y. Cent. R. Co.*, 28 Barb. (N. Y.) 80; *Snodgrass v. Carnegie Steel Co.*, 173 Pa. St. 228, 33 Atl. 1104; *Kindel v. Hall*, 8 Colo. App. 63, 44 Pac. 781; *McDonald v. Eagle & P. Mfg. Co.*, 68 Ga. 839; *Huffman v. Chicago, etc., Ry. Co.*, 70 Mo. 50.

to have known of the employee's incompetency.<sup>93</sup> Knowledge of the employer that an employee is in the habit of taking an occasional drink does not charge the former with knowledge of the latter's unfitness for his employment.<sup>94</sup> Proof of the bad reputation of a fellow servant of plaintiff by whose negligence plaintiff was injured is not proof that such fellow servant was actually reckless or careless, so as to render the employer liable for retaining him; and an employer who inquires of the former employer of an employee as to his competency and carefulness before employing him is not negligent in failing to inquire of such employee himself, so as to render it liable to a fellow servant of such employee for an injury caused by the latter's carelessness; but an employer who retains an unfit employee after knowledge of his unfitness was held liable for an injury to a co-employee, caused by the former's negligence, under California Civil Code, section 1971, providing that an employer must in all cases indemnify an employee for losses caused by the former's want of ordinary care, although, under section 1970, he is not liable unless he neglected to use ordinary care in the "selection" of the negligent employee.<sup>95</sup> Notice of incompetency given to a superintendent, foreman, or other vice-principal controlling the employment of co-employees, is notice to the employer.<sup>96</sup> But where the person to whom the notice is given had no authority to hire or discharge employees, the knowledge of incompetency cannot be imputed to the employer.<sup>97</sup>

**93.** *Seccombe v. Detroit Electric Ry. Co.*, 133 Mich. 170, 94 N. W. 747; 1 St. Ry. Rep. 349, and notes.

**94.** *Culbertson v. Met. St. R. Co.*, 140 Mo. 35, 36 S. W. 834.

**95.** *Gier v. Los Angeles Consol. Elec. R. Co.*, 108 Cal. 129, 41 Pac. 22. See also *Met. West Side Elev. Ry. Co. v. Fortin*, 1 St. Ry. Rep. 89, 203 Ill. 454, 67 N. E. 977, as to evidence of incompetency.

**96.** *Baulec v. New York & H. R. Co.*, 59 N. Y. 356, 17 Am. Rep. 325;

*Wust v. Erie City Iowa Works*, 149 Pa. St. 263, 24 Atl. 291; *Pittsburgh, etc., R. Co. v. Ruby*, 38 Ind. 294, 10 Am. Rep. 111; *Ohio N. R. Co. v. Colman*, 73 Ind. 261, 38 Am. Rep. 134; *Lytle v. Chicago & W. M. R. Co.*, 84 Mich. 289, 47 N. W. 571; *McDermott v. Hannibal & St. Joseph R. Co.*, 73 Mo. 516, 39 Am. Rep. 526; *Chapman v. Erie R. Co.*, 55 N. Y. 579.

**97.** *Reiser v. Pennsylvania Co.*, 152 Pa. St. 38, 25 Atl. 175, 34 Am. St. Rep. 62.

§ 443. **Contracts limiting or releasing liability.** — A contract between a street car company and its employees limiting its liability for injuries received by them while riding to and from work on its cars is not against public policy; the employees not being bound to enter or remain in the employ of the company.<sup>98</sup> Irrespective of statute it has been held, however, in many of the other States that a contract made in advance whereby an employee agrees to release and discharge his employer for any injury he may receive by reason of the negligence of his employer, or of his servants, is contrary to public policy and void, and no defense to an action therefor.<sup>99</sup> So in a later case in Massachusetts it is

**98.** *Peterson v. Seattle Trac. Co.*, 23 Wash. 615, 63 Pac. 539; *affd.*, 65 Pac. 543. A contract between an employee and his master, or another acting in the latter's interest, by the terms of which the employee, when physically injured, whether as a result of his own negligence or not, or when sick, is to receive pecuniary and other valuable benefits, and which stipulates that his voluntary acceptance of any of such benefits in case of injury is to operate as a release of the master from all liability on account thereof, is not in violation of a statute which provides that contracts between master and servant made in consideration of employment, whereby the master is exempted from liability to the servant for negligence, as such liability is now fixed by law, shall be void, as against public policy. *Petty v. Brunswick & W. Ry. Co.*, 109 Ga. 66, 35 S. E. 82; *Eckman v. Railroad Co.*, 169 Ill. 312, 48 N. E. 496, 38 L. R. A. 750; *Johnson v. Railroad Co.*, 163 Pa. St. 127, 29 Atl. 854; *Ringle v. Railroad Co.*, 164 Pa. St. 529, 30 Atl. 492; *Fuller v. Association*, 67 Md. 433, 10 Atl. 237; *Spitze v. Railroad Co.*, 75 Md. 162, 23 Atl. 307; *Lease v. Pennsylvania*

*Co.*, 10 Ind. App. 47, 37 N. E. 423; *Railway Co. v. Moore*, 152 Ind. 345, 53 N. E. 290, 44 L. R. A. 638; *Railway Co. v. Cox*, 55 Ohio St. 497, 45 N. E. 641, 35 L. R. A. 507; *Donald v. Railway Co.*, 93 Iowa 284, 61 N. W. 971, 33 L. R. A. 492; *Maine v. Railroad Co.*, (Iowa) 70 N. W. 630; *Chicago, B. & Q. R. Co. v. Bell*, 44 Neb. 44, 62 N. W. 314; *Chicago, B. & Q. R. Co. v. Curtis*, 51 Neb. 442, 71 N. W. 42; *Johnson v. Railway Co.*, 55 S. C. 152, 33 S. E. 174, 44 L. R. A. 645; *Owens v. Railroad Co.*, (C. C.) 35 Fed. 715, 1 L. R. A. 75; *State v. Railroad Co.*, (C. C.) 36 Fed. 615; *Otis v. Pennsylvania Co.*, (C. C.) 71 Fed. 136; *Shaver v. Pennsylvania Co.*, 71 Fed. 931.

**99.** *Purdy v. Rome, W. & O. R. Co.*, 125 N. Y. 209, 26 N. E. 255, 21 Am. St. Rep. 736; *Runt v. Herring*, 49 St. Rep. (N. Y.) 126, 21 N. Y. Supp. 244; *Richmond, etc., R. Co. v. Jones*, 92 Ala. 218, 9 So. 276; *Johnson v. Richmond, etc., R. Co.*, 86 Va. 975, 11 S. E. 829; *Roesner v. Herman*, 8 Fed. 782; *Railway Co. v. Spangler*, 44 Ohio St. 471, 8 N. E. 467; *Kansas Pac. R. Co. v. Peavey*, 29 Kan. 169, 44 Am. Rep. 630, 34 Kan. 472, 8 Pac. 780; *Little Rock*,

decided that a clause in a pass issued as a gratuity which exempts the carrier from liability is binding, but where such a pass is issued to an employee as one of the terms of his employment it is not binding.<sup>1</sup>

§ 444. **Violation of statute or ordinance.** — The violation of a municipal ordinance as to the speed of a street railway car, or as to the space required to be maintained between two cars driven in the same direction, does not render the company liable for an injury which was not the proximate result of such violation.<sup>2</sup> An employer cannot escape liability to an employee while engaged in manual labor caused by its negligence, on the ground that the injury occurred on Sunday, on which day manual labor is prohibited by a provision of the Penal Code.<sup>3</sup> While the violation of a local ordinance, prohibiting the owners of horses from leaving them unattended in the street and not fastened, is not negligence *per se*, as matter of law, it is competent evidence, and sufficient to justify the jury in finding as a fact that its violation was negligence.<sup>4</sup>

§ 445. **Servants of separate masters in same work.** — Where a street railway employee was injured by the negligence of a servant in the employ of another company, whose tracks plaintiff's employer used in common under a lease, he was not precluded from recovering against such company by reason of the accident, under a statute which provides that a person sustaining a personal injury while lawfully engaged or employed on or about the roads and premises of a railroad company of which he is not an

etc., *R. Co. v. Eubanks*, 48 Ark. 463, 3 Am. St. Rep. 245, 3 S. W. 808; *Harris v. Puget Sound Electric Ry.*, 52 Wash. 289, 6 St. Ry. Rep. 674, 100 Pac. 838.

1. *Dugan v. Blue Hill St. Ry. Co.*, 193 Mass. 431, 5 St. Ry. Rep. 432, 79 N. E. 748, holding that which of the two in case at bar was the fact was a question for the jury.

2. *Thompson v. Citizens' St. R. Co.*, 152 Ind. 461, 1 Rep. 930, 53 N. E. 462.

3. *Solarz v. Manhattan R. Co.*, 8 Misc. Rep. (N. Y.) 656, 59 St. Rep. (N. Y.) 537, 31 Abb. N. Cas. 426, 29 N. Y. Supp. 1123.

4. *McCambley v. Staten Island M. R. Co.*, 52 N. Y. Supp. 849.

employee, shall be entitled to recover against such company only as an employee, since he was not "engaged or employed on or about the road."<sup>5</sup>

§ 446. **Contributory negligence of servants.** — It is a doctrine of the law governing the relations of master and servant, that a servant cannot escape the result of his own contributory negligence on the ground that he is acting under orders from the master, when obedience to those orders involves exposure to such apparent danger that no prudent person would incur the risk.<sup>6</sup> To justify the effort of a servant to obey the order of a superior in a hazardous matter, the order must be immediate and upon a sudden emergency or exigency.<sup>7</sup> Where an employee is using an appliance on the car for an entirely different purpose from that for which it was intended and is injured it might be that the question of whether it was defective would be immaterial.<sup>8</sup>

§ 447. **Contributory negligence of servants continued—Instances.** — Where an electric lineman, in the discharge of his duties, ascends a telegraph pole, it is not incumbent on him to make an inspection of the pole, where the defect is not obvious.<sup>9</sup> Where the evidence showed that plaintiff's intestate was excavating under defendant's street railway, over which the cars were continually passing; that while working in the trench he was struck by a car; that he saw it approach and leaned back to be out of the way; and that there was plenty of room in the trench for him to remain at a safe distance from the car as it passed,

5. *Kelly v. Union Trac. Co.*, 9 Pa. Dist. Rep. 69.

6. *Mason & Perkins v. Post*, 105 Va. 494, 5 St. Ry. Rep. 844, 54 S. E. 311.

7. *Chattanooga Elec. R. Co. v. Lawson*, 101 Tenn. 406, 47 S. W. 489, 12 Am. & Eng. R. Cas. N. S. 669.

8. *Carroll v. Union Ry. Co.*, 52 Misc. Rep. (N. Y.) 163, 5 St. Ry. Rep. 762, 101 N. Y. Supp. 745.

9. *Walsh v. New York & Q. C. Ry. Co.*, 80 App. Div. (N. Y.) 316, 80 N. Y. Supp. 767, and when his purpose is to cut wires, he has a right to use such of the appliances furnished as appear to him to be reasonably safe for the performance of the task, and he is not bound to fasten the pole with guy ropes, braces, etc., unless the danger of proceeding otherwise is known and obvious.

but that he raised up so as to bring his face near the car, and was struck by the step, he was guilty of contributory negligence preventing recovery.<sup>10</sup> Where a person about to engage in taking down electric wires is warned by his employer of the danger and cautioned to be careful, but disregards the warning, and is injured in consequence, he cannot be regarded as being in the exercise of due care for his own safety.<sup>11</sup> Where a conductor on an electric car, who is also a competent motorman, temporarily exchanged places with the motorman, there being at the time no apparent danger of an accident, and, while the conductor was running the car, a collision occurred with a snow plow running around a curve in the opposite direction, solely through the fault of defendant's train dispatcher, fatally injuring the conductor, the latter is not chargeable with contributory negligence merely by being in the place of the motorman, and standing at his post while endeavoring to avoid the collision.<sup>12</sup> Where a motorman injured in a collision with a railway train sued the street car company and alleged that he was assured by the company that the railway track was seldom used, and was accordingly ordered to run across without stopping his car, and without opportunity for looking for trains; that, relying on the representations, he did as directed, and received the injury, the complaint showed plainly that the plaintiff was guilty of contributory negligence in crossing the track without looking for cars, and hence was bad on demurrer.<sup>13</sup> Where in an action for injuries received by a motorman in a collision of his car with another car it appeared that he had violated a rule of the company relating to the care to be used in the operation of cars on a single track, it was held that he was guilty of contributory negligence as a matter of law.<sup>14</sup> Where a motorman left a turnout or passing switch with full knowledge of the approach from the opposite direction of another car at a high rate

**10.** *Riddle v. Forty-Second St., M. & St. N. Ave. Ry. Co.*, 173 N. Y. 327, 66 N. E. 22; revg. 72 App. Div. (N. Y.) 619, 76 N. Y. Supp. 1029.

**11.** *Tri-City Ry. Co. v. Killeen*, 92 Ill. App. 57.

**12.** *Gamble v. Akron, B. & C. R. Co.*, 63 Ohio St. 352, 59 N. E. 99.

**13.** *Goodrich v. Chippewa Valley Elec. R. Co.*, 108 Wis. 329, 84 N. W. 419.

**14.** *Barry v. Boston Elevated Ry.*

of speed, which, in violation of the rules of the company, had left the only intervening turnout in advance of its schedule and such motorman continued to move forward, ringing his gong but making no effort to check his car until a collision was inevitable, believing that the offending car would moderate its speed and retrace its course, he was held to be guilty of negligence barring a recovery for injuries received in a collision with such car, although his car had the right of way and he proceeded under orders from his conductor and under general instructions of the superintendent.<sup>15</sup> A conductor of a street car is, as a matter of law, guilty of contributory negligence in standing upon the running-board of an open car in such a position as to be struck by a car upon the adjoining track, which was thirty-seven and a half inches distant from the track on which his car was standing, where he had been a conductor for nine years, although he had never before worked in an open car, and the open cars were wider than the closed ones.<sup>16</sup> A conductor of a street car was guilty of contributory negligence in attempting to mount the front platform of his car as it was going out of the barn, within such a short distance from the post at the side of the track that he was caught between it and the body of the car, where he was familiar with the surroundings and knew that he was likely to be squeezed if he got between the car and the post, although he did not know how close it was to the track.<sup>17</sup> No recovery can be had for the death of a motorman of an electric car proximately caused by his running his car rapidly over a bridge in violation of a rule of the company.<sup>18</sup> The driver of a street car is guilty of contributory negligence preventing recovery for an injury, in making no at-

Co., 194 Mass. 265, 5 St. Ry. Rep. 408, 80 N. E. 225.

15. *Mason & Perkins v. Post*, 105 Va. 494, 5 St. Ry. Rep. 844, 54 S. E. 311.

16. *Fletcher v. Phila. Trac. Co.*, 190 Pa. St. 117, 43 W. N. C. 519, 5 Am. Neg. Rep. 721, 42 Atl. 527; *Ladd v. Brockton St. Ry. Co.*, (Mass.) 62 N. E. 730. But not where the tracks

were too near to permit cars to pass in safety and he was not warned of the danger. *True v. Niagara Gorge R. Co.*, 70 App. Div. (N. Y.) 383, 75 N. Y. Supp. 216.

17. *Reiser v. New York & H. R. Co.*, 24 App. Div. (N. Y.) 23, 48 N. Y. Supp. 868.

18. *Rittenhouse v. Wilmington St. R. Co.*, 120 N. C. 544, 26 S. E. 922.

tempt to remedy the brake of his car on finding that it was not in good order.<sup>19</sup> The conductor on an electric car is not guilty of contributory negligence in standing in the space between a switch track and the main line while turning the switch point, where such position is the usual one, and not in itself a place of peril, although he might with safety have stood in another place and turned the switch.<sup>20</sup> Where a motorman, on reaching a street crossing with his car, failed to look for an approaching car, and a collision resulted, he was guilty of contributory negligence preventing a recovery.<sup>21</sup> In an action for injuries received by a motorman jumping from his car to avoid injury in a threatened collision between his car and another car proceeding in the opposite direction at a curve in the road where the track was screened from view by trees until the cars were almost upon each other, it was held that the greater weight of evidence tended to prove that the car dispatcher gave an erroneous order to the conductor of plaintiff's car, which caused the collision, and that under the circumstances the question of plaintiff's contributory negligence in jumping from the car was properly submitted to the jury.<sup>22</sup> Upon the question of an employee's negligence in alighting from a car while in motion it was said by the court that it could not be ruled, as matter of law, as the defendant in effect asked the court to rule, that the plaintiff was negligent not only in attempting to get off the car while in motion, but also in attempting to alight while the car was in motion at a place where the road was banked with snow. It was not, however, as matter of law, necessarily negligent for him to attempt to alight while the car was in motion.<sup>23</sup>

**§ 448. Acts or omissions constituting negligence.**—Where plaintiff, a car repairer, worked with another repairer, the latter's

**19.** *Kenney v. Second Ave. R. Co.*, 89 Hun (N. Y.) 340, 35 N. Y. Supp. 305, 60 St. Rep. (N. Y.) 781.

**20.** *Gier v. Los Angeles Consol. Elec. R. Co.*, 108 Cal. 129, 41 Pac. 22.

**21.** *Bobb v. Union Trac. Co.*, 206 Pa. St. 265, 55 Atl. 972.

**22.** *Edge v. Southwest Missouri Elec. Ry. Co.*, 206 Mo. 471, 6 St. Ry. Rep. 106, 104 S. W. 90.

**23.** *Flynn v. Connecticut Val. St. Ry. Co.*, 196 Mass. 587, 6 St. Ry. Rep 766, 82 N. E. 1085.

failure to keep watch while plaintiff went between the cars was not such negligence as would defeat recovery for injury to plaintiff from a collision with other cars.<sup>24</sup> While plaintiff assumed the risk incident to the usual method of doing the work, he did not assume the increased hazard arising from the foreman's negligence.<sup>25</sup> And where the plaintiff, an assistant superintendent, was injured in alighting from a car from which the step had been removed and there was evidence tending to show that he was engaged in the performance of duties imposed upon him and was properly using the car for that purpose, and that he had called the attention of the superintendent to the absence of the step, and that the latter had promised to have it repaired immediately, it was decided that it could not be declared, as a matter of law, that the plaintiff, who neither had charge of repairing the step nor upon whom such duty was imposed, could be regarded as assuming the risk and was not in the exercise of due care.<sup>26</sup> In the case of an injury to the conductor by the alleged incompetence of the motorman, it was said an apprehension by the plaintiff that the ordinary management of the car might be found not to include necessarily a forecast that, after an explicit order to stop at a certain point to avoid an obstruction plainly visible on the track, he would be incapable of obedience, and heedlessly cause a collision. Under such circumstances it cannot be held, as matter of law, that a servant voluntarily takes the risk of the subsequent accident, as the conduct of the servant also must be found to have been accompanied by a voluntary purpose to expose himself to a danger which he appreciates. It, therefore, became a question of fact for the jury to determine under proper instructions whether the plaintiff voluntarily placed himself in this position.<sup>27</sup>

§ 449. Who are fellow servants. — The conductor and motorman on an electric car are fellow servants, and the negligence

**24.** *Street's Western Cable Car Line v. Bonander*, 196 Ill. 15, 63 N. E. 688.

**25.** *Street's Western Cable Car Line v. Bonander*, 196 Ill. 15, 63 N. E. 688.

**26.** *Flynn v. Connecticut Val. St. Ry. Co.*, 196 Mass. 587, 6 St. Ry. Rep. 766, 82 N. E. 1085.

**27.** *Coney v. Commonwealth Ave. St. Ry. Co.*, 196 Mass. 11, 6 St. Ry. Rep. 757, 81 N. E. 905.

of the former is imputable to the latter.<sup>28</sup> The gripman of a cable car and a watchman, whose duty it was to give signals at a curve to prevent more than one train from passing at a time, were fellow servants, and hence there was no liability on the part of the company for an injury to the watchman, caused by the negligence of the gripman in operating the car.<sup>29</sup> The court will not, however, take judicial notice of the relation between the driver and conductor of a street car, and the negligence of the driver is not to be imputed to its conductor, where it does not appear that the driver is under the directions of the conductor as to the car's management, other than in obeying signals to stop and go on when taking on and letting off passengers.<sup>30</sup> Any negligence of the inspector of the electrical apparatus of a trolley car who, after inspecting it for efficiency, says: "All right, put your pole on," acting on which the conductor puts on the trolley, and the car runs on him, the controller being open, is that of a fellow servant.<sup>31</sup> But a passenger upon a street car, who assists in getting defendant's street car off the track at the request of the driver, in order to pass an obstruction by another of defend-

**28.** *Savage v. Nassau Electric R. Co.*, 42 App. Div. (N. Y.) 241, 59 N. Y. Supp. 225; *affd.*, 168 N. Y. 680, 61 N. E. 1134, where an experienced motorman who had knowledge of the rule that when a car was found defective after it started from the terminus of the line, it was to be brought back on the right-hand track, was ordered to take out a car and did so on that track, along which he proceeded slowly, ringing the bell because of a thick fog, when he was run into by a car returning in accordance with the rule, and injured, it was held that the proximate cause of the accident was the negligence of the conductor and motorman in taking out the car on the wrong track on a densely foggy morning, that the company was not liable, and that the

motorman was properly nonsuited in an action brought against the company for his injuries.

**29.** *Murray v. St. Louis Cable & W. Ry. Co.*, 98 Mo. 572.

**30.** *Seaman v. Koehler*, 122 N. Y. 646, 25 N. E. 35. An employee charged with the duty of working machinery with another employee is not a coemployee in such a sense as to relieve the employer from responsibility for an injury to one of them which happens through the defect of machinery, although that defect may have been brought about by the negligence of the other employee. *McDade v. Washington & Georgetown R. Co.*, 5 Mackey (D. C.) 144.

**31.** *Shugard v. Union Traction Co.*, 51 Atl. 325, 201 Pa. St. 562.

ant's cars, or who assists in pushing it upon a side track at the request of the driver of the car, does not thereby engage in the service of the company as a volunteer, nor is he a fellow servant of the driver, and the doctrine of *respondeat superior* applies, making the company liable for an injury sustained by him while so engaged.<sup>32</sup> And one employed to lay tracks for a street car company, with transportation to and from work as part consideration, and who has no duties to perform in connection with the operation of the car on which he rides, and whose contract does not require him to ride on any particular car or on any car, is not a fellow servant of the employees operating the car at the time of an injury received by him, while so riding, exonerating the company from liability therefor.<sup>33</sup> One employed by a street car company to make trips at certain hours of the day, and who, while riding on one of the defendant's cars when not on duty, under a rule of defendant allowing employees to ride at any time free of charge, was injured through the negligence of the motorman, was not barred from recovering for such injuries, as a fellow servant of the motorman, since at the time of the accident he was not in the employ of the company.<sup>34</sup> The general rule is that the question whether servants of the same masters are fellow servants is a question of fact, to be determined by the jury from a consideration of all the facts and circumstances proven in the particular case, under proper instructions from the court.<sup>35</sup> To create the relation of fellow servants it is essential that at the time of the injury they shall be directly co-operating in the particular business in hand, or that their usual duties shall bring them into habit-

**32.** *Stastney v. Second Ave. R. Co.*, 18 N. Y. Supp. 800, 46 St. Rep. (N. Y.) 900; *McIntire St. Ry. Co. v. Bolton*, 43 Ohio St. 224, 1 N. E. 333.

**33.** *Peterson v. Seattle Trac. Co.*, 63 Pac. 539, 23 Wash. 615, judgment affirmed on rehearing, 65 Pac. 543.

**34.** *Dickinson v. West End St. Ry. Co.*, 59 N. E. 60, 177 Mass. 365, 52 L. R. A. 326.

**35.** *Met. West Side Elev. Ry. Co.*

*v. Fortin*, 1 St. Ry. Rep. 89, 203 Ill. 454, 67 N. E. 977. The definition of a fellow-servant is a question of law, in regard to which the jury must be instructed with substantial accuracy; but it is always a question of fact, to be determined by the jury from the evidence, whether or not the particular case falls within the definition. *Chicago City Ry. Co. v. Leach*, 104 Ill. App. 30.

ual consociation, so that they may exercise an influence on each other promotive of proper caution.<sup>36</sup> A street car conductor who employs a bystander *sui juris* whom he stations in a safe place, to drive the car back to a switch while he manages the brake at the other end of the car, is a co-employee of the emergency man, and the latter cannot recover for an injury due to the conductor's negligence.<sup>37</sup> A foreman of a gang of men who has not authority to discharge the men is their fellow servant in respect to his acts, while working with them.<sup>38</sup> An employee, engaged in towing cars with a horse, cannot recover for an injury received in coupling a car, on the ground that the conductor, who directed plaintiff to couple the cars, acted as a vice-principal and not as a fellow servant, where the only authority exercised by the conductor was in directing plaintiff to couple the cars, and at the time of the injury they were actually co-operating in the particular work.<sup>39</sup> The motorman of an electric car and an employee put in charge of the track are fellow servants.<sup>40</sup> A conductor of a cable car is a fellow servant of a gripman and another conductor upon another car of the same train.<sup>41</sup> The negligence of a motorman in disobeying a rule of the company requiring those in charge of its cars to give timely warning of their approach to a track crew is the negligence of a fellow servant of a member of such crew, and is not chargeable to the company as a violation of its duty to use reasonable care to provide a safe place for the trackman to do his work.<sup>42</sup> The trackmaster of a cable road company, who

**36.** *Chicago City Ry. Co. v. Leach*, 104 Ill. App. 30, 80 Ill. App. 354, the gripman of one street car is not the fellow servant of the conductor of another car injured by the former's negligence, there being no association between the men. And see *North Chicago St. R. Co. v. Conway*, 76 Ill. App. 621.

**37.** *Marks v. Rochester Ry. Co.*, 41 App. Div. (N. Y.) 66, 58 N. Y. Supp. 210; affg. 77 Hun (N. Y.) 77, 28 N. Y. Supp. 314.

**38.** *Riley v. Galveston City R. Co.*, 13 Tex. Civ. App. 247, 35 S. W. 826.

**39.** *Blah v. West Chicago St. Ry. Co.*, 100 Ill. App. 393.

**40.** *Rittenhouse v. Wilmington St. R. Co.*, 120 N. C. 544, 26 S. E. 922.

**41.** *North Chicago St. R. Co. v. Dudgeon*, 69 Ill. App. 57; *Baltimore Trust G. Co. v. Atlanta Traction Co.*, (C. C., N. D. Ga.) 69 Fed. 357.

**42.** *Lundquist v. Duluth St. R. Co.*, 65 Minn. 387, 67 N. W. 1006, 4 Am. & Eng. R. Cas. N. S. 506.

has authority to hire men, and has sole charge of a squad of workmen under him, represents the company, and is not a fellow servant of the workers under him.<sup>43</sup> A car dispatcher of an interurban railway, having control of all the conductors and motormen as well as the control and management of all the cars and their operation, is a vice-principal and not a fellow servant of the conductors and motormen.<sup>44</sup> Where it was the duty of the

**43.** *Mullane v. Houston, etc., R. Co.*, 21 Misc. Rep. (N. Y.) 10, 46 N. Y. Supp. 957; affg. 20 Misc. Rep. (N. Y.) 434, 45 N. Y. Supp. 1039.

**44.** *Edge v. Southwest Missouri Elec. Ry. Co.*, 206 Mo. 471, 6 St. Ry. Rep. 106, 104 S. W. 90. In the opinion of the court this question of vice-principal and fellow servant is considered at length and the following extract is of value in this connection: "The undisputed facts are, the car dispatcher, whose office was at Webb City, had not only control of the plaintiff, but he had control of all the conductors and motormen, as well as the control and management of all the cars and their operation. There is a broad distinction between the relations that exist between fellow servants and that which exists between them and the vice-principal of the company. In discussing this question, the Supreme Court of the United States said: 'There is a clear distinction to be made in relation to their common principle between the servants of a corporation exercising no supervision over others engaged with them in the same employment, and agents of a corporation clothed with the control and management of a distinct department in which their duty is entirely that of direction and superintendence.' *Railroad v. Ross*, 112 U. S. 390, 5 S. Ct. 184, 28 L. ed. 787. All this court quoted the above lan-

guage approvingly in discussing a like question, and added: 'In *Sheehan v. Railroad*, 91 N. Y. 332, and *Railroad v. McLallen*, 84 Ill. 109, the superintendent and assistant superintendent, acting as train dispatchers, were held to be vice-principals. In the case last cited it is said that as between the conductor and the company the assistant superintendent, to whose orders the trains are all subject, is the representative of the corporation, and that the rule applies as well to all orders issued by his assistants, and in his name.' And, continuing, this court said: 'That a train dispatcher is to be regarded as the representative of the company is, in effect, held in the following cases: *Booth v. Railroad*, 73 N. Y. 38, 29 Am. Rep. 97; *Railroad v. Henderson*, 37 Ohio St. 552; *Washburn v. Railroad*, 3 Head (Tenn.) 638, 75 Am. Dec. 784; *Darrugan v. Railroad*, (Conn.) 24 Am. L. Reg. 453.' This court then concluded by holding that a train dispatcher of a railroad in charge and control of the movements of the trains, and to whose order the conductors and engineers were subject, was a representative of the company, and not a fellow servant with those engaged in operating and moving the trains. *Smith v. Ry. Co.*, 92 Mo. 359, 4 S. W. 129, 1 Am. St. Rep. 729. And Judge TAFT said in an opinion he delivered in the case of

plaintiff and his foreman to oil and reset cable wheels in pits along a cable street railroad, and plaintiff and his foreman took

Baltimore & Ohio Ry. Co. v. Camp, 65 Fed. 959, 960, and 964, 13 C. C. A. 233, 239: 'He (the train dispatcher) is a vice-principal for two reasons: First, because he is *pro tempore* in supreme control of a distinct department of the railroad, namely, the running department of the company for his division; and, second, because the work which he is called upon to do is the discharge of a positive duty owed by the company to its employees. \* \* \* Again, the railway company is bound to provide general laws and general time-tables for the reasonably safe operation of its railway system, and also rules applicable to emergencies likely to arise. It is inevitable that at times and in sudden exigencies the general time-table must be set aside. It then becomes the duty of the company to construct a temporary time-table with such care and skill that it may be reasonably adapted to secure the operation of all trains on the road without accident or injury to passengers or employees. The person who devises this temporary time-table for the company and issues telegraphic orders to carry it out is the train dispatcher. He acts, it is true, under certain rules, but he is intrusted with a wide discretion and absolute control. \* \* \* That he is the representative of the company, and not the fellow servant of those required to obey his orders, is held by many courts.' The Supreme Court of Pennsylvania, in the case of Lewis v. Seifert, 116 Pa. 628, 11 Atl. 514, 2 Am. St. Rep. 631, held 'that a train dispatcher of a railroad company was

not a fellow servant with the engineer, and that the company was liable for damages for his injury caused by the negligence of the dispatcher.' State v. Seifert, 11 Atl. 514, 116 Pa. 628, 2 Am. St. Rep. 631, 636, 637. Judge McCRAZY held that 'the negligence of the person who was employed by the railroad company to direct the movements of trains, by telegraph or otherwise — as, for example, the train dispatcher, train-master, or whoever the persons are — is not chargeable to a person occupying, as this plaintiff did, the position of fireman, and the negligence of such persons is the negligence of the company.' Crew v. St. Louis Ry. Co., (C. C.) 20 Fed. 87-92. The Supreme Court of Michigan, in discussing this question, said: 'This cannot be applied when the superior causing the injury represents the master, and it is always a subject of inquiry to ascertain the nature and extent of the authority of the superior whose negligence caused the injury. If his authority and duties are such as the master must necessarily, either personally or by another, exercise and discharge, then this rule does not apply. \* \* \*' In such case, 'he is the corporation for the time being, and exercises powers which neither the superintendent nor the president nor any other officer or agent of the corporation can interfere with;' and cites the case of Smith v. R. Co., 92 Mo. 359, 4 S. W. 129, 1 Am. St. Rep. 729, among many others; and then held that the dispatcher was not a fellow servant with the employees who were engaged in the operation of

turns, one going into the pit while the other watched for cars and teams that might approach, in order to give warning to the one

the train. *Hunn v. Michigan Cent. Ry. Co.*, 44 N. W. 502, 78 Mich. 513, 7 L. R. A. 500; also *Hankins v. N. Y. Ry. Co.*, 37 N. E. 466, 142 N. Y. 416, 25 L. R. A. 396, 40 Am. St. Rep. 616. It was held in the case of *Clyde v. Richmond Ry. Co.*, (C. C.) 69 Fed. 678, that 'the only legal question involved is as to the finding of the special master that the train dispatcher is the *alter ego* of the defendant. The correctness of this finding is too clear for discussion. He is not, either upon principle or authority, a fellow-servant of the engineer;' and citing the following cases: *Hankins v. Railroad*, 142 N. Y. 416, 37 N. E. 466, 25 L. R. A. 396, 40 Am. St. Rep. 616; *Dana v. Railroad*, 92 N. Y. 639; *Slater v. Jewett*, 85 N. Y. 62, 39 Am. Rep. 627; *Darrigan v. Railroad*, 52 Conn. 285, 52 Am. Rep. 590; *Lewis v. Seifert*, 116 Pa. 628, 11 Atl. 514, 2 Am. St. Rep. 631; *R. Co. v. Berry*, 58 Ark. 198, 23 S. W. 1097, 25 L. R. A. 386; *R. Co. v. McLallen*, 84 Ill. 109; *Washburn v. R. Co.*, 3 Head (Tenn.) 638, 75 Am. Dec. 784; *R. Co. v. Arispe*, 5 Tex. Civ. App. 611, 23 S. W. 928, 24 S. W. 33; *McKin, Fed. Serv.*, § 143. To the same effect are the following cases: *R. Co. v. Henderson*, 37 Ohio St. 552; *R. Co. v. Dwyer*, 36 Kan. 58, 12 Pac. 352; *Phillips v. R. Co.*, 64 Wis. 476, 25 N. W. 544; *R. Co. v. Kanaley*, 39 Kan. 1, 17 Pac. 324; *McKune v. R. Co.*, 21 Am. & Eng. R. Cas. 539; *Murphy v. Smith*, 19 C. B. (N. S.) 361; *Moran's Case*, 44 Md. 283; *Dobbins v. R. Co.*, 81 N. C. 446, 31 Am. Rep. 512; *Cowles v. R. Co.*, 84 N. C. 309, 37 Am. Rep. 620; *Dowling v. Allen*, 74 Mo.

13, 41 Am. Rep. 298. The same rule is stated by this court in the following language: 'This duty, of course, in an extensive business, the master cannot attend to in person, but must intrust to servants; but the servants to whom it is intrusted act in the master's place and perform his duty, and, if they are negligent, it is his negligence. It is necessary to observe a distinction between the performance, on the one hand, of the work for which the business is undertaken, and the furnishing, on the other, of the appliances and field of operation with which and in which to do the work. In the one, the servants are working for a common master; in the other, the master, either *per se* or *per alium*, is performing his duty to the servant, and, whether he acts *per se* or *per alium*, if he fails to exercise reasonable care he is negligent.' *Jones v. Railway*, 178 Mo., loc. cit. 544, 77 S. W. 890, 101 Am. St. Rep. 434. Judge GOODE, of the St. Louis Court of Appeals, states the rule clearly in a case where, in obedience to the directions of a foreman, the plaintiff, who was a motorman, started out of the car sheds with a car, but stopped after passing outside a car's length or so from a structure called the "sand shed" to get some sand for use on the trip, as was his duty. The foreman ordered him to stop where he did, and, while there, the foreman started the car without warning and injured him. Judge GOODE said: 'In Missouri the power of superintendence and control has often been taken as the true criterion, though it is rejected in various ju-

in the pit to escape before being struck, plaintiff's foreman, while on watch, was plaintiff's fellow servant, so that defendant was not

risdictions. The decision for the plaintiff in the case just cited (*Bane v. Irwin*, 172 Mo. 306, 72 S. W. 522) was put on the ground that the employee whose negligence hurt him had authority to direct and control him. This test of the master's responsibility is expounded on principle and authority, and the Missouri cases cited in *Miller v. Railroad*, 109 Mo. 350, 19 S. W. 58, 32 Am. St. Rep. 673. It strikes us as a reasonable test and well suited to work out just results under the complicated industrial systems of these days, when enterprises have many distinct departments and headquarters under separate managers, and the proprietors of them rarely give orders to or personally supervise the employees.' *Blen v. St. Louis Transit Co.*, 3 St. Ry. Rep. 570, 108 Mo. App., loc. cit. 409, 83 S. W. 986. The case of *Miller v. Railway*, *supra*, was where the conductor of a construction train, who had charge and control of the crew of men engaged in repairing the railroad track, ordered the injured party to perform certain services upon one of the cars, and while he was in the act of stepping from a car the train was, without warning, moved, and threw him down between the wheels and injured him. Judge BLACK, in discussing that case, said: 'Where the master gives to a person power to superintend, control, and direct the men engaged in the performance of work, such person is as to the men under him a vice-principal, and it can make no difference whether he is called a superintendent, conductor, boss, or foreman. For his negligent

acts and omissions in performing the duties of the master, the master is liable. This principle of law has been often asserted by this court and applied under a variety of circumstances.' *Klochinski v. Lumber Co.*, 93 Wis. 417, 67 N. W. 934; *Bane v. Irwin*, 172 Mo. 317, 72 S. W. 522; *Donahoe v. Kansas City*, 136 Mo., loc. cit. 670, 38 S. W. 571. The gigantic institutions engaged in construction, production, and distribution are so vast and far-reaching, in which powerful machinery and multitudes of employees are engaged, it becomes not only impracticable for their proprietors or principals to personally superintend, operate, and control them, and as a result they are compelled to resort to agents to carry on their business, and these agents are variously called superintendents, general managers, foremen, bosses, etc. Many of those institutions are so large and complicated one superintendent cannot control and operate them, and in such case they either have a superintendent and assistants, or divide their business into departments, with a superintendent or foreman in charge of each department. All of these agents, under whatever name or title they may be known or called, represent the principal. From this condition of those institutions has grown up the wise and almost universal rule of restriction of the fellow-servant law, known as the vice-principal, and the departmental doctrine, which hold the master liable to one servant for the negligent performance by another of these personal duties which every master owes to his

liable for injuries to the plaintiff by reason of the foreman's negligence in the performance of such duty; and the oiler having voluntarily consented to work, with knowledge of the danger, and with the precautions afforded him, assumed the risk of injury, notwithstanding such precautions.<sup>45</sup>

**§ 450. Assumption of risk by servants of street railroad company.** — The doctrine of "assumption of risk" rests for its support upon an agreement of the employee with his employer, express or implied from the circumstances of his employment, that his employer shall not be liable to him in damages for any injury incident to the service he is employed to perform, resulting from a known or obvious danger arising in the performance of the service.<sup>46</sup> A master is relieved from responsibility to a servant

employees. There is really no legal distinction between the two rules; in the former the vice-principal is supposed to have charge of the entire business of his principal, while in the latter he has only charge of his department. The law imposes upon the master certain duties regarding the safety of his servants, which he may delegate to another, but by doing so he is in no wise discharged from the responsibility of their proper performance. If a servant be injured through the negligent performance of any such duty by another to whom such duties have been delegated, the principal cannot escape liability therefor on the ground of negligence of the fellow-servant. The rule may be restated as follows: A servant intrusted with the performance of the master's personal duties is, in regard to those duties, a vice-principal or representative of the master, and his acts as such, whether of omission or commission, are the acts of the principal; and, if negligently performed, the principal is liable for all injuries that

may naturally flow therefrom, and he must answer in damages to the injured servant the same as if he had committed the act in person. A distinction is to be drawn between mere telegraph operators and train dispatchers, as well as the other employees of a railroad. A telegraph operator ordinarily is not invested with any control over the running of trains, and it has been held that a telegraph operator does not occupy the position of a train dispatcher merely because he transmits or delivers orders for the movement of trains, and that his negligence cannot be said to be the negligence of the company. 12 Am. & Eng. Enc. of Law. (2d ed.) 968." *Per* BURGESS, J.

**45.** *Ryan v. Third Ave. R. Co.*, 86 N. Y. Supp. (120 St. Rep.) 1070.

**46.** *Atchison, T. & S. F. Ry. Co. v. Bancord*, 66 Kan. 81, 71 Pac. 253; *Savage v. Rhode Island Co.*, 28 R. I. 391, 5 St. Ry. Rep. 829, 67 Atl. 633. A servant does not assume risks as incident to his employment, which might have been removed by the use

for injuries resulting from the ordinary risks of his employment, and the servant assumes the natural and reasonable risks incidental to the particular service in which he is engaged, but he does not assume the risks of the master's negligence.<sup>47</sup> The servant assumes such risks of his employment as are usually incident to it, and the extraordinary hazards of which he has notice, or which in the usual exercise of his faculties he ought to have noticed; but he does not assume the risk of dangers, known to the master, which can be avoided by him in the exercise of reasonable care.<sup>48</sup>

The servant is not required to assume that the master will permit the presence of an unseen and unheard dangerous agency, when there is no use or purpose for such agency to serve, and though the servant may know that such agency could be present, but only through gross carelessness or neglect of the master, he is not required to assume such dereliction on the master's part.<sup>49</sup> The servant has a right to presume that all proper attention will be given to his safety, and that he will not be carelessly or needlessly exposed to risks not necessarily resulting from his occupation, and preventable by ordinary care and precaution on the part of his employer.<sup>50</sup> The rule of the assumption of obvious risks

of reasonable care on the master's part for his protection, unless the dangers are open to ordinary observation. *Duggan v. Third Ave. R. Co.*, 9 Misc. Rep. (N. Y.) 158, 59 St. Rep. (N. Y.) 681, 29 N. Y. Supp. 13; *affg.* 8 Misc. Rep. (N. Y.) 89, 58 St. Rep. (N. Y.) 816, 28 N. Y. Supp. 598.

**47.** *Carter v. McDermott*, 35 Wash. L. Rep. 72, 5 St. Ry. Rep. 72.

**48.** *Pittsburgh, C. & St. L. Ry. Co. v. Hewitt*, 102 Ill. App. 428; *affd.*, 202 Ill. 28, 66 N. E. 829. It is well settled that the risks of the service a servant assumes in entering upon the employment of a master are only those which occur after the due performance by the employer of those duties which the law enjoins upon

him. *Drake v. Auburn City Ry. Co.*, 173 N. Y. 466, 66 N. E. 121; *revg.* 75 N. Y. Supp. 1124. *Benzing v. Steinway Sons*, 101 N. Y. 552, 5 N. E. 449; *McGowan v. Central Vermont R. Co.*, 123 N. Y. 280, 25 N. E. 373; *Goldthwait v. Haverhill & G. St. R. Co.*, 160 Mass. 554; *Blaird v. Shreveport Belt R. Co.*, 48 La. Ann. 1057, 20 So. 284, 4 Am. & Eng. R. Cas. N. S. 349; *Rogers v. Galveston City R. Co.*, 76 Tex. 502, 13 S. W. 540; *Reinig v. Broadway R. Co.*, 49 Hun (N. Y.) 269; *Pierce v. Camden, etc., Ry. Co.*, 58 N. J. L. 400, 35 Atl. 286, 6 Am. Electl. Cas. 377.

**49.** *Cessua v. Metropolitan St. Ry. Co.*, 118 Mo. App. 659, 5 St. Ry. Rep. 619, 95 S. W. 277.

**50.** *Pittsburg, C. & St. L. Ry.*

does not rest wholly upon the implied agreement of the employee, but on the independent act of waiver, evidenced by his continuing in the employment with a full knowledge of all the facts.<sup>51</sup> Where an employee of a street railway company, injured in a collision, claimed that he was employed at certain wages, with transportation to and from his work, unconditionally, and the company claimed the contract of transportation was limited by a provision against a liability for injury, though ticket books, with the limitation thereon, were strong proof to substantiate defendant's contention, they were not conclusive.<sup>52</sup> Where a master fails to employ competent and prudent employees, the risk resulting therefrom is extra-hazardous and is not among the risks which the servant assumes, unless he has notice of such incompetency and, after such notice, assumed such extra hazard by failing to quit the service in which he was employed. The question as to whether he has notice of the incompetency of fellow servants is a question of fact to be determined by the jury.<sup>53</sup>

Co. v. Hewitt, 102 Ill. App. 428; *affd.*, 202 Ill. 28, 66 N. E. 829.

**An employee has the right to assume**, in the absence of evidence that dangerous machinery or appliances which he had in charge was defective, that the master has used due diligence to keep it in order and in a safe condition. *Delude v. St. Paul City R. Co.*, 55 Minn. 63, 56 N. W. 461.

**51.** *Drake v. Auburn City Ry. Co.*, 173 N. Y. 466, 66 N. E. 122; *O'Maley v. South Boston Gaslight Co.*, 158 Mass. 135, 32 N. E. 1119, 47 L. R. A. 161. "The doctrine of the assumption of the risks of his employment by an employee has usually been considered from the point of view of a contract, express or implied; but as applied to actions of tort for negligence against an employer, it leads up to the broader principle expressed in the maxim, "*Volenti non fit in-*

*juria*;" one who, knowing and appreciating a danger, voluntarily assumes the risk of it, has no just cause of complaint against another who is primarily responsible for the existence of the danger. As between the two, his voluntary assumption of the risk absolves the other from any particular duty to him in that respect, and leaves each to take such chances as exist in the situation, without a right to claim anything from the other. In such a case there is no actionable negligence on the part of him who is primarily responsible for the danger."

**52.** *Peterson v. Seattle Traction Co.*, 23 Wash. 615, 63 Pac. 539; *affd.*, 65 Pac. 543.

**53.** *Metropolitan West Side El. Ry. Co. v. Fortin*, 1 St. Ry. Rep. 89, 203 Ill. 454, 67 N. E. 977, 107 Ill. App. 157.

§ 451. **Particular risks assumed.**—One who enters into the employ of an electric railway company, knowing that the cars have no fenders or guards, assumes the risks of injury from want thereof.<sup>54</sup> A motorman on an electric car assumes the risk of using it with a defective brake, where he works on the car with knowledge of the defect.<sup>55</sup> A street railway conductor was required, as part of his duty, to assist the motorman in turning the car on a turntable at the end of the line. The turntable got out of repair, so that the turning was hindered by the rails scraping against the sides of the turntable pit. The conductor was aware of this condition the day before the accident, and on the day in question had assisted in turning the car three times, but had been assisted in so doing by passengers. In attempting to turn the car with only the motorman's assistance he over-exerted and strained himself. It was held that he was under no obligation to do this, and, in so doing, assumed the risk.<sup>56</sup> A conductor on an open street car assumes, as part of the risk of the employment, any enhancement of the danger from the presence of a passenger on the running-board along the side of the car; and it makes no difference that the passenger is a superintendent of the railroad company, superintending at the time, to the extent of having an eye on the way the car is managed, and that there are seats in the car, so that it is not necessary for him to be on the running-board.<sup>57</sup> Plaintiff, who had been employed for four years in defendant's boiler-room, and had seen the construction of the boilers and of a bridge suspended in front of them and used the bridge, sometimes, once a day, and from the floor could see the entire platform to the bridge, and the space where the platform ended, assumed the risk, and could not recover for injury caused by his falling through the space while making his way from the boilers, where he had gone to shut off escaping steam caused by an explo-

54. *Chandler v. Atlantic Coast Elec. R. Co.*, 61 N. J. L. 380, 39 Atl. 674, 4 Am. Neg. Rep. 189.

55. *Windover v. Troy City R. Co.*, 4 App. Div. (N. Y.) 202, 38 N. Y. Supp. 591.

56. *Roberts v. Indianapolis St. Ry. Co.*, 158 Ind. 634, 64 N. E. 217.

57. *Hall v. Wakefield & St. Ry. Co.* 178 Mass. 98, 59 N. E. 668, and where he has been some time in the service,

sion.<sup>58</sup> Where plaintiff, employed by a street railway company, was working at night on a trestle which crossed a lake, and knew that at intervals ties had been sawed in two; and he stepped on a tie, which gave way with him, and he fell through the trestle; and the foreman testified that he had warned the men of the danger of the work, and he was corroborated by other witnesses; and plaintiff testified that he had not been warned; and several electric lights hung over the place where the work was being carried on, making it very light; it was held that plaintiff could not recover, inasmuch as the danger was an apparent one.<sup>59</sup> Plaintiff, engaged in learning the duties of conductor on defendant's car, while standing on the running-board of a moving car along the track on the side of a road, was struck by a trolley post and injured. He was an experienced man, and familiar with the duties of a conductor. He knew that it was common to have the tracks on one side of the street, and knew that in such cases there would be trolley posts. He was sent out on this part of the road to learn the conditions of its operation, and had made two trips before the accident. He failed to observe whether the car was in the center or on the side of the road, and paid no attention to trolley posts, and when stepping down on the running-board to perform certain duties as conductor, he did not look to see if there were obstructions. The running-board on the opposite side of the car could have been used with safety. Defendant's tracks had been in the same position for several years, and the condition of the track and trolley posts was not unusual. It was held that the plaintiff assumed the risk, the danger being obvious.<sup>60</sup> Where a motorman was injured by reason of his coming into collision with another car which was backing up, and he was familiar with the methods and rules of the defendant's company, and knew that cars had been backed at this

and knows of the presence of a tree close to the track, he assumes the risk of the danger therefrom.

**58.** *Rohan v. Met. St. Ry. Co.*, 59 App. Div. (N. Y.) 250, 69 N. Y. Supp. 570. And see *French v. First*

*Ave. Ry. Co.*, 24 Wash. 83, 63 Pac. 1108.

**59.** *Robare v. Seattle Traction Co.*, 24 Wash. 577, 64 Pac. 784.

**60.** *Ladd v. Brockton St. Ry. Co.* 180 Mass. 454, 62 N. E. 730.

place and were likely to be backed again, and knew the means that were likely to be employed for determining whether or not a car was approaching or going away from him, under such circumstances he may be said to have assumed the risk of such methods.<sup>61</sup> Where a servant knows that the appliances with which he works are defective, and he does not complain of their condition, he assumes the risk thereof.<sup>62</sup> An employee of a street railroad company, who is stationed between the tracks for the purpose of turning switches, assumes the risk of injury from stepping back against a moving trailer in sudden alarm, caused by the plunging of horses attached to a car on another track.<sup>63</sup> A carpenter at work on a ladder in front of a car stable, who knows that another employee is engaged in removing waste material with a horse and cart, which would frequently pass in and out of the building, necessitating the removal and replacing of the ladder, accepts the risk as incident to the employment.<sup>64</sup> A conductor of an electric car who stands upon the bunter of a moving car in attempting to disconnect the trolley from the wire while

**61.** *Secombe v. Detroit Elev. R. Co.*, 133 Mich. 170, 94 N. W. 747, 1 St. Ry. Rep. 349, and notes, holding also that where it was claimed that the negligence of the defendant consisted in allowing the track to remain in bad condition, causing cars to be derailed at a switch, thus making it necessary to back the next car to another switch, although the worn rail causing the derailment of the car might have been a remote cause of the injury, it was not the proximate cause thereof entitling the plaintiff to recover; also that the burden of proof was upon the plaintiff to show that the defendant was negligent either in employing or retaining an incompetent servant. See also *Lang v. Transp. Line Co.*, 119 Mich. 85, 77 N. W. 633.

**62.** *Van Sickle v. Atlantic Ave. R.*

*Co.*, 12 Misc. Rep. (N. Y.) 217, 33 N. Y. Supp. 265, where it appeared that the plaintiff's intestate, a car repairer, was repairing a car on the track by a switch leading to the car-house of the company, and another car unexpectedly, owing to a defective switch, took the track upon which the car was on which he was at work, and it was because of this defect that the injury occurred. See also *Gibson v. Erie R. Co.*, 63 N. Y. 49; *Laning v. New York Cent. R. Co.*, 49 N. Y. 521; *Williams v. Delaware, C. & W. R. Co.*, 116 N. Y. 628, 22 N. E. 1117.

**63.** *Thompson v. Citizen's St. R. Co.*, 152 Ind. 461, 53 N. E. 462, 1 Rep. 930.

**64.** *Byrnes v. Brooklyn H. R. Co.*, 36 App. Div. (N. Y.) 355, 55 N. Y. Supp. 269.

passing under a low bridge, and connect it again after its passage, assumes the risk of being thrown from the car by a severe jolt, where he knows that the track at such points is uneven.<sup>65</sup> An employee of an elevated railroad company, who has been employed for more than three weeks in a yard elevated some distance above the street grade, and who has actual knowledge that it is not in a completed state, and that carpenters are employed in covering it with plank, assumes the risk of working thereon while there are uncovered spaces.<sup>66</sup> An experienced employee, familiar with, and continually working about a defective switch, and also familiar with another employee and his method of doing the work allotted to him, assumes any risks resulting from the use of the switch or the incompetency of the other employee.<sup>67</sup> Where plaintiff had worked upon poles in the construction and repair of electric lines for many years and knew that it was his duty to climb poles which had been set in the ground for an uncertain length of time, and that his climbing such poles and taking down and putting up wires would add a strain much greater than the pole would be exposed to in sustaining the wires when they were all in proper position, the risk of falling on account of the weakness of old poles was, therefore, a risk of the business which the plaintiff assumed by his contract to work as a lineman for defendant, and as between plaintiff and defendant, the defendant was under no obligation to inspect the poles to see whether they were safe or unsafe.<sup>68</sup>

§ 452. **Particular risks not assumed.** — A conductor on a trolley line does not assume the risk of being struck by a passing car,

65. *McCauley v. Springfield St. R. Co.*, 169 Mass. 311, 47 N. E. 1006.

66. *Kennedy v. Manhattan R. Co.*, 145 N. Y. 288, 39 N. E. 956, 64 St. Rep. (N. Y.) 705.

67. *Van Sickle v. Atlantic Ave. R. Co.*, 12 Misc. Rep. (N. Y.) 217, 66 St. Rep. (N. Y.) 857, 33 N. Y. Supp. 265.

68. *Kellog v. Denver City Tram-*

*way Co.*, 1 St. Ry. Rep. 27, 18 Colo. App. 475, 72 Pac. 609. It was also held in this case that since the defendant had furnished the plaintiff with proper machinery and appliances for the bracing and security of poles, it could not be charged with the negligence or lack of reasonable care in that regard.

while standing on the running-board of his car, collecting fares, where the tracks are unnecessarily constructed too near together for only a few feet of the line; he not knowing of the danger, and it not being obvious to him.<sup>69</sup> And where an electric railway engaged a contractor to ballast the roadbed, allowing the contractor to operate a car thereon, but the company retained the right to direct the management of cars and signals, a motorman who remained in the occupation of the company did not assume the risk of a collision with the contractor's car, and the railroad company was liable for the negligence of the contractor's employees.<sup>70</sup> Where the plaintiff when injured was not engaged in the performance of his duties as an employee, being employed as a laborer in the construction of a power-house, and his injury occurring while being transported upon one of the cars of the company, which run into a switch which had been opened by a third person, and in the performance of his duties no notice would come to him of the defect in the switch, he cannot be held to have assumed any such risk.<sup>71</sup> And an employee who is directed by the superintendent to get upon a pile of lumber quickly, and throw a piece of timber, does not, as matter of law, assume the risk of the pile falling because the piling is improperly done, where he does not know that it is not properly piled.<sup>72</sup>

**69.** *True v. Niagara Gorge R. Co.*, 70 App. Div. (N. Y.) 383, 75 N. Y. Supp. 216. A street car conductor did not assume the risk incident to the exceptional proximity of an overhead wire pole, which caused his death, where it was several inches closer than the other poles, and he was ignorant of such fact, and could not by reasonable diligence have ascertained it. *Pikesville, etc., R. Co. v. State*, Russell, 88 Md. 563, 5 Am. Neg. Rep. 358, 42 Atl. 214. A servant temporarily engaged in more hazardous work than that for which he is employed assumes all such risks incident to the work as are equally open to the observation of himself

and the master. *North Chicago St. R. Co. v. Conway*, 76 Ill. App. 621.

**70.** *Ortlip v. Phila. & W. C. Traction Co.*, 198 Pa. St. 586, 48 Atl. 497.

**71.** *Noe v. Rapid Ry. Co.*, 133 Mich. 152, 94 N. W. 743, 1 St. Ry. Rep. 339 and notes, holding also that, conceding the plaintiff to be a fellow servant of the motorman, the company was still liable, as the evidence did not show that the injury was caused by the negligence of the motorman, but that the fault was in not providing a safe system in running the cars, for which the company was liable.

**72.** *Millard v. West End St. R.*

§ 453. **Knowledge by servant of defect or danger.**— While knowledge on the part of an employee of a defect in an appliance will not defeat a recovery as against his employer, unless he knew that such defect rendered the appliance dangerous, the employee cannot recover if the use of the defective appliance could not have caused his injury if he had not placed himself in a position of danger in its use.<sup>73</sup> \* Where a conductor on a street railway, who was killed by coming in contact with a tree near the track, had been over the road frequently as conductor and as motorman, and was familiar with the situation and fully advised as to the proximity of the trees, by continuing in the employment with the knowledge of the facts, deceased must be held to have assumed the risk, and it was no error to submit the question of defendant's negligence to the jury.<sup>74</sup> One employed to assist in replacing unsafe wooden poles supporting trolley wires, with iron poles, cannot recover for an injury caused by the fall of a decayed wooden pole against which the ladder upon which he was standing rested, since he was harmed by the defect he was hired to repair; nor was the wooden pole an instrumentality furnished by the master, although he was attempting to place a block and tackle on it for the purpose of getting the new pole in position.<sup>75</sup> An electric street railway company is not guilty of such negligence as will render it liable to a conductor who was caught between

Co., 173 Mass. 512, 6 Am. Neg. Rep. 287, 53 N. E. 900.

**73.** *Hayzel v. Columbia Ry. Co.*, 19 App. D. C. 359, where, in an action against a street car company by a former conductor for injuries while coupling cars, defendant is charged with negligence in having on the plaintiff's car an unsafe appliance for the coupling of cars, or in having a safe appliance in a bad condition, and the plaintiff himself shows that he knew of the defect before the accident, and that he incurred the risk with full knowledge of the danger, and without any command or instruc-

tion to that effect from any officer of the company, the trial court properly instructs the jury to return a verdict for the defendant.

**74.** *Drake v. Auburn City Ry. Co.*, 173 N. Y. 466, 66 N. E. 121; revg. 75 N. Y. Supp. 1124. See also *Kennedy v. Manhattan Ry. Co.*, 145 N. Y. 288, 39 N. E. 956; *Appel v. New York & P. Ry. Co.*, 111 N. Y. 550; *Gibson v. Erie Ry. Co.*, 63 N. Y. 449, 20 Am. Rep. 552; *Williams v. Delaware, L. & W. R. Co.*, 116 N. Y. 628, 22 N. E. 1117.

**75.** *Broderick v. St. Paul City R. Co.*, 74 Minn. 163, 77 N. W. 28.

the side of a trail car and the doorway or pier of its power-house through which he assisted in pushing the car, because there were only three and a half inches of space on each side between the car and the door, the danger of attempting to pass between the car and the pier being obvious, and everything about the construction being open and transparent, and the injury occurring because he failed to let go of the car when he came to the doorway.<sup>76</sup> The fact that a street car conductor, who brings an action for personal injury received through a defective brake, knew that the brake would not properly control the motion of the car without applying unusual force, did not conclusively charge him with notice that injury might be expected from use of the brake.<sup>77</sup> Where the risk is non-obvious or extraordinary it is a matter as to which the employee is entitled to special warning and instruction and the company has the burden of showing that such a warning has been given. And where evidence is introduced, which is uncontradicted or denied, that an employee was so warned by another employee under whose charge he was on a previous day, the burden of proof is sustained.<sup>78</sup>

§ 454. **Engaging outside of duties.** — An employee in a car repair shop who was mortally injured by a blow received from the revolving handle of a windlass, defective because it had no ratchet, but which he endeavored to stop, was guilty of such negligence and voluntary assumption of an obvious risk as will bar a recovery by his personal representatives for his death, where he was a man of mature years and experience, and had worked in the shop for some time.<sup>79</sup>

§ 455. **Fellow servants and their negligence.** — An employer is not liable for an injury to an employee caused by the negligence

**76.** *Jennings v. Tacoma R. & Motor Co.*, 7 Wash. 275, 34 Pac. 937.

**77.** *Newhart v. St. Paul City R. Co.*, 51 Minn. 42, 52 N. W. 983. And see *Highland Ave., etc., R. Co. v. Walters*, 91 Ala. 435, 8 So. 357.

**78.** *Savage v. Rhode Island Co.*, 28 R. I. 391, 5 St. Ry. Rep. 829, 67 Atl. 633.

**79.** *Cunningham v. Lynn & B. St. R. Co.*, 170 Mass. 298, 49 N. E. 440.

of a fellow servant; but that the negligence of a coemployee co-operated with the negligence of the employer in causing such injury does not relieve the employer from liability.<sup>80</sup> The fact that the acts of negligence of a servant by which a fellow servant was injured prohibited by law does not affect the question of the liability of the master to the servant injured.<sup>81</sup> But where in an action by a motorman for personal injuries suffered in a collision between cars, it appeared that an inexperienced fellow servant of plaintiff was placed on a car as motorman, and, through overwork or loss of sleep, failed to keep his car the distance from plaintiff's car, which he was following, as required by a rule of the company, and that in consequence a collision occurred injuring plaintiff, it was held that the defendant railway company having placed on a car a motorman who was overworked and whose senses were not acute because of a loss of sleep, could not invoke the fellow-servant rule to excuse itself from liability.<sup>82</sup>

§ 456. **Change by statute of the common-law rule as to employer's liability.** — Employers' Liability Acts are now in force in New York, Massachusetts, Alabama, Indiana, and Colorado. The acts of New York, Alabama, and Colorado apply to all classes of employees and contain no exceptions.<sup>83</sup> The Massachusetts act applies to all classes, except domestic servants and farm laborers, injured by other servants.<sup>84</sup> The Indiana act applies merely to employees of railroad and other corporations, except municipal, operating in the State, and does not extend to the employees of firms or individuals.<sup>85</sup> The purpose and effect of these acts are

**80.** *Sheridan v. Long Island R. Co.*, 27 App. Div. (N. Y.) 10, 50 N. Y. Supp. 215. See *Carter v. McDermott*, 35 Wash. L. Rep. 158, 5 St. Ry. Rep. 72.

**81.** *Lundquist v. Duluth St. R. Co.*, 65 Minn. 387, 67 N. W. 1006, 4 Am. & Eng. R. Cas. N. S. 506.

**82.** *Fort Wayne & Wabash Valley Traction Co. v. Crosbie*, 169 Ind. 281, 5 St. Ry. Rep. 249, 81 N. E. 474.

**83.** N. Y. Laws of 1902, chap. 600; Ala. Civ. Code 1896, chap. 43, §§ 1749-1751; Acts of 1885, p. 115; Colo. Session Laws of 1893, chap. 77.

**84.** Mass. Rev. Laws 1902, chap. 106, §§ 71-79; Stat. 1887, chap. 270, as amended.

**85.** *Fallon v. West End St. R. Co.*, 171 Mass. 249, 50 N. E. 536.

to extend the common-law rights of employees and the common-law liability of employers for personal injuries suffered through their negligence by their employees in certain cases. The New York act fixes the rule as to assumption of risk and contributory negligence by providing that the question of the employee's "continuance in the same place and course of employment with knowledge of the risk of injury shall be one of fact," instead of law. The extent of the application of these acts to the employees of street railroads has not yet been passed upon by the courts. In a recent case under the New York act it was held that in an action for the negligent death of an employee, where there was no evidence that the location at which deceased was working was defective, that any appliances were out of order, or that any precaution was omitted by defendant that was possible to protect deceased in the performance of his work, no liability was shown under the Employers' Liability Act (Laws 1902, p. 1748, chap. 600, § 1, subd. 1), giving an action for injury to an employee caused by reason of a defect arising from the employer's negligence in the ways, works, or machinery connected with the employer's business; that the evidence was insufficient to show that the injury resulted from the negligence of one engaged in superintendence, or one acting as superintendent, within the meaning of subdivision 2 of section 1 of the act, giving an action in such case; that the evidence was insufficient to show that the servant was himself in the exercise of due care, within subdivision 2 of section 1 of the act, giving an action for servant's injuries resulting from the negligence of one intrusted with superintendence when the servant is in the exercise of due care and diligence; and that it must be shown that the servant was in the exercise of such care to authorize a recovery.<sup>86</sup> In Indiana it has been held in a railroad case that an employee injured by the negligence of another while both were acting in the line of duty as employees of a corporation has a right of action against the company, under

**86.** *McHugh v. Manhattan Ry. Co.*, 88 App. Div. (N. Y.) 554, 85 N. Y. Supp. (119 St. Rep.) 184.

the Indiana Employers' Liability Act of 1893.<sup>87</sup> Under the second subdivision of section 1 of the Indiana Employers' Liability Act (section 7083, Burns, Ann. St. 1901) providing that "every railroad or other corporation, except municipal, operating in this State, shall be liable for damages for personal injuries, suffered by any employee, while in its service the employee so injured being in the exercise of due care and diligence, in the following cases: \* \* \* 'Where such injury resulted from the negligence of any person in the service of such corporation, to whose order or direction the injured employee at the time of the injury was found to conform and did conform,'" it is said that the test of the liability is threefold: First. Was the offending servant clothed by the employer with authority to give orders to the injured servant that the latter was forced to obey? Second. Did the injury result to the latter from the negligence of the former while conforming to an order of the former that the injured servant was, at the time, bound to obey? Third. Was the injured party at the time of the injury in the exercise of due care and diligence.<sup>88</sup> In Massachusetts it has been held that a street railroad car operated by electricity in the usual manner is not a locomotive engine or train upon a railroad within Massachusetts Laws 1887, chap. 270, § 1, cl. 3, with reference to the liabilities of railroad companies for injuries to employees.<sup>89</sup> Under similar statutes in other States the courts have rendered certain decisions as follows: A street railway company is not a "railway corporation" within the meaning of the Texas Fellow Servants Act of May 4, 1893.<sup>90</sup> Street car companies are not within the purview of Minn. Laws 1887, chap. 13, modifying the law as to injuries sustained by one servant by the negligence of his fellow servants in cases of railway companies.<sup>91</sup> The proprietor of a machine

**87.** *Pittsburgh, C., C. & St. L. R. Co. v. Montgomery*, 152 Ind. 1, 49 N. E. 582, 9 Am. & Eng. R. Cas. N. S. 792.

**88.** *Indianapolis St. Ry. Co. v. Kane*, 169 Ind. 25, 5 St. Ry. Rep. 273 80 N. E. 841, 81 N. E. 721.

**89.** *Fallon v. West End St. R. Co.*, 171 Mass. 249, 50 N. E. 536.

**90.** *Riley v. Galveston City R. Co.*, 13 Tex. Civ. App. 247, 35 S. W. 826.

**91.** *Lundquist v. Duluth St. R. Co.*, 65 Minn. 387, 67 N. W. 1006, 4 Am. & Eng. R. Cas. N. S. 506.

shop is not liable for injuries to a servant due to negligence of the superintendent of the shop, under Mass. Stat. 1887, chap. 270, § 1, cl. 2, making employers liable for injuries to co-employees from the negligence of persons intrusted with and exercising superintendence where at the time of the injury the superintendent was not exercising superintendence, but was merely acting as a fellow servant.<sup>92</sup> The provision of Act of 1897 in North Carolina that in actions against a railroad company for death or injuries sustained by an employee the negligence of a fellow servant shall not be a defense, does not apply to an accident to an employee before its passage.<sup>93</sup> Const. Miss., § 193 (Ann. Code Miss. 1892, § 3559), providing that every employee of a railroad corporation shall have the same rights and remedies for an injury caused by the act or omission of the corporation or its employees as are allowed by law to others not employees, where the injury results from the negligence of a superior agent or officer, or of a person having the right to control or direct the service of the party injured, does not abrogate the common law rule as to the liability of the master for the negligence of a fellow servant, but merely modifies the rule when the injury results from the negligence of a "superior agent or officer," or of "a person having the right to control or direct the services of the party injured."<sup>94</sup> A chartered street railroad is a railroad company within the meaning of Ga. Civ. Code 1895, §§ 2297, 2323, making railroad companies liable to one servant for injuries inflicted by a fellow servant.<sup>95</sup> Mo. Rev. Stat. 1899, § 2873, which provides "that every railroad corporation owning or operating a railroad in this State shall be liable for all damages sustained by any agent or servant thereof while engaged in the work of operating such railroad by reason

**92.** *Brittain v. West End St. R. Co.*, 168 Mass. 10, 46 N. E. 111.

**93.** *Rittenhouse v. Wilmington St. R. Co.*, 120 N. Car. 544, 26 S. E. 922.

**94.** *Fenwick v. Illinois Cent. R. Co.* (U. S. C. C. A., Miss.), 100

Fed. 247, 40 C. C. A. 369. See also *Louisville, N. A. & C. Ry. Co. v. Wagner*, 153 Ind. 420.

**95.** *Savannah, etc., Ry. Co. v. Williams*, 117 Ga. 414, 43 S. E. 751, 61 L. R. A. 249.

of the negligence of any other agent or servant thereof," does not apply to street railroads.<sup>96</sup>

§ 457. **Liability of masters to third persons — For acts of servants or agents.** — The liability of a master arising out of an act of negligence committed by his servant does not rest upon the ground that the master himself was negligent, but upon considerations of public policy, which hold him responsible for the acts of his agents when acting about his business.<sup>97</sup> The master is responsible for injury to a third person by negligence of a servant acting in the execution of his orders, although the act was not necessary for the proper performance of the duty to the master, or was even contrary to the master's order.<sup>98</sup> A master is not liable for an assault by his employee on a third person, in the commission of which the employee was acting outside the scope of both his actual and apparent authority.<sup>99</sup> A railroad company is not liable for the language and conduct of one of its foremen, authorized to employ and discharge, when necessary, laborers in service of the company, by which such employees are kept from trading with a grocer, thus injuring his business.<sup>1</sup> The driver of a one-horse street car having a brake at only the front end of the car has authority to employ an assistant to drive the horse when it

**96.** *Sams v. St. Louis & M. R. Co.*, 174 Mo. 53, 73 S. W. 686, 61 L. R. A. 475.

It seems that the Fellow Servant Act of 1897, in Missouri, does not apply to street railways but applies to an interurban railway from thirty to thirty-five miles in length which passes through some twelve or fifteen towns or stations with but little of the track inside of the city limits. *Edge v. Southwest Missouri Elec. Ry. Co.*, 206 Mo. 471, 6 St. Ry. Rep. 106, 104 S. W. 90.

**97.** *Helms v. Northern Pac. Ry. Co.* (U. S. C. C., Minn.), 120 Fed. 389.

See sections 328-334 herein as to acts toward passengers, and chapter XVII. as to duty of company towards persons other than passengers and employees.

**98.** *McCann v. Consol. Traction Co.*, 59 N. J. L. (30 Vroom) 481, 36 Atl. 888, 38 L. R. A. 236, 7 Am. & Eng. R. Cas. N. S. 280.

**99.** *Rudgeair v. Reading Traction Co.*, 180 Pa. St. 333, 36 Atl. 859; *Hamilton v. Third Ave. R. Co.*, 13 Abb. Pr. N. S. (N. Y.) 318.

**1.** *Graham v. St. Charles St. R. Co.*, 47 La. Ann. 1656, 49 Am. St. Rep. 436, 18 So. 707.

becomes necessary to draw the car backward; and in doing so he stands in the place of the master, and such relation continues to exist during the continuance of such employment.<sup>2</sup> The action of the driver of a street car in slapping with his lines at a boy who is running along the street opposite and near to the car platform, thus annoying him, is not within the scope of his business, so as to render the company liable for injuries thereby caused.<sup>3</sup> A clerk in the claim department of a street railroad company, who is sent to the police court to see what the matter is when a conductor has been arrested and taken off his car when causing the arrest of a person who refused to pay fare, has no authority to defend the conductor, so that his so doing will be a ratification of the conductor's act in causing the passenger's arrest and make the company liable for it.<sup>4</sup> The mere fact that a servant acted wilfully, maliciously, or wantonly does not show that he is no longer in his master's employment, so as to relieve the latter from liability for injuries caused thereby.<sup>5</sup> Where a street car conductor unjustifiably charged a passenger with having given him a counterfeit coin and called a policeman and caused the passenger's arrest, the street car company is liable for the false imprisonment; the act of its conductor not being outside the scope of his authority.<sup>6</sup> The rule that a master is liable for the wilful torts of his servant committed in the course of the servant's employment, applies as well where the master is a corporation as where he is a private individual.<sup>7</sup> Where the day's work of a conductor of a street car had been finished, and he had no longer any duty to perform in or about a car, but it was in the absolute charge of another conductor, the act of the first conductor in ringing a bell as a signal to start was an unauthorized assumption of

**2.** *Marks v. Rochester R. Co.*, 77 Hun (N. Y.) 77, 59 St. Rep. (N. Y.) 848, 28 N. Y. Supp. 314. 588, 31 Chic. Leg. N. 42, 88 Fed. 437, 31 C. C. A. 573.

**3.** *Chicago City R. Co. v. Mogk*, 44 Ill. App. 17; *Mogk v. Chicago City R. Co.*, 80 Ill. App. 411. **5.** *Baltimore Consol. R. Co. v. Pierce*, 89 Md. 495, 45 L. R. A. 527, 6 Am. Neg. Rep. 539.

**4.** *Lezinsky v. Met. St. Ry. Co.*, (C. C. A., 2d C.) 59 U. S. App. **6.** *West Chicago St. R. Co. v. Luleich*, 85 Ill. App. 643. **7.** *Central of Ga. Ry. Co. v. Brown*,

authority, not within the line of his duty or the scope of his employment, and the railroad company would not be responsible for any accident thereby.<sup>8</sup> The mere employment of a watchman to guard property and keep away trespassers does not involve an authority to shoot trespassers, and such authority cannot be presumed.<sup>9</sup> Punitive damages are not recoverable against a master for the wrongful act or negligence of his servant unless he has ratified the misconduct, or unless it is committed after the unfitness of the servant has become known to the master.<sup>10</sup>

**§ 458. Liability of masters to third persons — For acts of independent contractors.** — A street railway company is liable for an injury received by a spectator at an exhibition of marksmanship given at a pleasure resort owned and advertised by it, although the performance was provided and conducted by an independent contractor, where a small fragment of a bullet or other metallic substance which flew from the impact when the bullet hit the butt, struck the plaintiff in the eye.<sup>11</sup> A street railway company which advertises a balloon ascension at a park owned and controlled by it is liable for the death of a child at such ascension caused by the fall of a pole to which the balloon was attached where proper notice of the fact that it would fall was not given, even though the person making the ascension was employed as an independent contractor.<sup>12</sup> A street railway company cannot avoid its liability to pay damages to individuals in consequence of the reconstruction of a canal bridge under a permission from the superintendent of public works which, as required by N. Y. Laws 1866, chap. 836, § 9, imposed the payment of such damages as a condition, by delegating the performance of the work to an

113 Ga. 414, 38 S. E. 989; *Aiken v. Holyoke St. Ry. Co.*, 184 Mass. 269, 68 N. E. 238.

8. *Lima Ry. Co. v. Little*, 67 Ohio St. 91, 65 N. E. 861.

9. *Belt Ry. Co. v. Banicki*, 102 Ill. App. 642.

10. *Kastner v. Long Isl. R. Co.*,

76 App. Div. (N. Y.) 323, 78 N. Y. Supp. 469, 12 N. Y. Ann. Cas. 77.

11. *Thompson v. Lowell, L. & H. St. R. Co.*, 170 Mass. 577, 40 L. R. A. 345, 49 N. E. 913.

12. *Richmond & M. R. Co. v. Moore*, 94 Va. 493, 27 S. E. 70, 37

L. R. A. 258, 3 Va. Law Reg. 572,

individual contractor.<sup>13</sup> But a street car company is not liable for injuries to a conductor through the negligence of an independent contractor, engaged by it to repair the pavement between its tracks, in piling stones alongside the track.<sup>14</sup> And the negligence of a contractor building a street railway as to a rope or wire across a public street, will not render the street railway company liable, if the contractor was simply authorized to construct the road and the manner of doing the work was left to his skill and judgment, although he is not a resident of the State. The principle that a railway company cannot delegate to a contractor its charter rights and privileges so as to exempt it from liability does not extend to the use of the ordinary means employed for the construction of a road, but to the use of such extraordinary powers as the corporation itself could not exercise without first having complied with the conditions of the legislative grant.<sup>15</sup> The owner of a building is not answerable for the negligent manner in which a coal company having a contract to furnish the owner with all the coal necessary for running his machinery performs its contract in delivering the coal through a scuttle-hole in the sidewalk, while the contractor is engaged in performing its contract; but the owner is required to give personal attention to see that the cover of the scuttle-hole is properly replaced after its use by the contractor, if no direction as to the manner of replacing it was given to the contractor.<sup>16</sup> For an injury sustained by reason of an excavation in a public street, the workman whose personal act or omission caused the damage, and the contractor who employed and controlled him, are liable, but a corporation for which the work is being done is not liable.<sup>17</sup> Where plaintiff was injured in an accident on a street railway, and has brought

and the company is liable regardless of the manner in which the injured person reached the park.

**13.** *Weber v. Buffalo R. Co.*, 20 App. Div. (N. Y.) 292, 47 N. Y. Supp. 7.

**14.** *North Chicago St. R. Co. v. Dudgeon*, 69 Ill. App. 57.

**15.** *Sanford v. Pawtucket St. R.*

*Co.*, 19 R. I. 650, Index S. S. 126, 33 L. R. A. 564, 35 Atl. 67, 4 Am. & Eng. R. Cas. N. S. 318.

**16.** *Benjamin v. Met. St. Ry. Co.*, 133 Mo. 274, 34 S. W. 590.

**17.** *Hanson v. Met. St. Ry. Co.*, 27 Misc. Rep. (N. Y.) 538, 58 N. Y. Supp. 286.

suit for the injury, and the company sent a doctor to examine him, and he directed plaintiff, who claimed he could not stand on his left leg, to try to stand on it, and in the effort to do so plaintiff fell, from the effect of which he became subject to hysterical trouble, the company was not liable for the injury occasioned thereby, since the physician in making the examination was an independent contractor, distinctly free from the control of his employer.<sup>18</sup> Where an elevated railway company was authorized to occupy certain public streets by a city ordinance, and left certain construction work to an independent contractor, it was liable for the negligence of the contractor's servants in dropping a heavy piece of steel on a pedestrian who was passing under the structure; since the contractor was performing the work by virtue of a special privilege granted the corporation by its charter and by the ordinance.<sup>19</sup> Where the person who causes an injury is a contractor, he will be regarded as the agent or servant of the corporation for whom he is doing the work, if he is exercising some chartered privilege or power of a corporation with its assent, which he could not exercise independently of its charter.<sup>20</sup>

**18.** *Pearl v. West End St. Ry. Co.*, 176 Mass. 177, 57 N. E. 339, 49 L. R. A. 826. And see *Second v. Railway Co.* (C. C.), 18 Fed. 221, 225.

**19.** *Met. West Side El. R. Co. v. Dick*, 87 Ill. App. 40.

**20.** *Suburban R. Co. v. Balkill*, 94 Ill. App. 454; *Deming v. Terminal Ry. of Buffalo*, 49 App. Div. (N. Y.) 493, 63 N. Y. Supp. 615. In the case last cited plaintiff was injured by the upsetting of a carriage, caused by an embankment from four to seven feet high, which had been thrown up in the public highway by the defendant contractors under a contract with the defendant railway company, preparatory to building an elevated roadway over the defendant company's track. On the night of the accident

there was no light to warn travelers of the presence of the embankment. The Supreme Court had authorized the railroad company to build the roadway, and also ordered the company to comply with the requirements of General Railroad Law, § 11, which authorizes railroad companies to excavate, fill in, or change the grade of a highway when necessary to carry its line across the roadway. It was held that the defendant railroad company was liable for the injury, as a joint tortfeasor, and could not escape liability under the rule that exempts a party from damages for the negligent act or omission of an independent contractor, who has undertaken work for the benefit and at the instance of the party with whom he

§ 459. **Nature and form of remedy.** — Where the duty which a master owes to his servant is imposed by law, by reason of their relation, as well as by the contract of service, the servant may, on a breach of such duty, treat the wrong suffered as a tort, and bring an action *ex delicto*.<sup>21</sup> The right of an employee to maintain an action against his employer, under the Employers' Liability Acts of the several States, is not identical with his right to maintain an action at common law. It may be greater or it may be less. If based upon the common-law liability the plaintiff is not obliged to give notice of the injury and the amount recovered is not limited. Where plaintiff brings his action under the statute his cause of action should be set forth in the declaration or complaint as falling within the terms of certain sections or clauses of the statute.<sup>22</sup> Where a plaintiff was injured in Maryland, but brought his action to recover damages for the injury in the District of Columbia, his right to recover was held to be governed by the *lex loci* and not by the *lex fori*.<sup>23</sup>

§ 460. **Liability of company for medical services rendered to injured employees and others.** — Although an employer is not bound, by virtue of the relation between them, to furnish medical aid to an injured employee, the fact that an employee has been disabled while in the employ of a railroad company, and in the discharge of his hazardous duties, is a sufficient consideration to support a promise to pay for the nursing and medical attendance necessary to his cure.<sup>24</sup> There is no legal duty imposed upon

contracts; since the railroad company having interfered with the highway under the permission of a statute, had imposed on it the obligation to protect the public from accidents by reason of such interference. See also *Woodman v. Railroad Co.*, 149 Mass. 335, 21 N. E. 482, 4 L. R. A. 213.

21. *Kansas City, F. S. & M. R. Co. v. Becker*, 67 Ark. 1, 46 L. R. A. 814, 53 S. W. 406.

22. *Coffee v. New York, etc., R. Co.*, 155 Mass. 21, 28 N. E. 1128; *Highland Ave., etc., R. Co. v. Dusenberry*, 94 Ala. 413, 10 So. 274; *Fenwick v. Illinois Cent. R. Co.*, (U. S. C. C. A., Miss.) 100 Fed. 247, 40 C. C. A. 369.

23. *Carter v. McDermott*, 35 Wash. L. Rep. 72, 5 St. Ry. Rep. 72.

24. *Toledo, W. & W. Ry. Co. v. Rodrigues*, 47 Ill. 188.

the railroad company, in the absence of statutory requirement or of agreement by an authorized official, to furnish medical attendance to employees and others injured through the negligence of the company. If any liability exists, it must arise from agreement of the parties, and not from the relation between them, or the employment, or the necessity of the situation.<sup>25</sup> It is a rule of law, settled on grounds of public policy as much as on contract, that one who enters the service of another takes upon himself all the usual risks incident to the employment, and consequently that the servants of a railroad company cannot recover damages of the company for injuries received in its service in consequence of the negligent conduct of another servant, as a passenger upon the company's road or any third person might do. If, therefore, anything is paid by the company to the injured servant in such cases, it is by way of gratuity and not by way of compensation. But it is within the powers of the general superintendent of a railroad to bind the company by a contract for medical aid rendered an employee of the company while in service.<sup>26</sup> As a general rule it has been held that subordinate employees, such, for example, as station agents, conductors, engineers and roadmasters, cannot bind the company by their contract for medical attendance upon persons injured on the road. But their agreement may become binding when ratified by higher officials of the company.<sup>27</sup>

**25.** *Adkins v. Atlanta & C. A. Ry. Co.*, 27 S. Car. 71, where a statute provides a duty of this kind; *Terre Haute & I. R. Co. v. McMurray*, 98 Ind. 358, holding that under certain circumstances such a general duty might in justice devolve upon the company.

**26.** *Marquette & C. R. Co. v. Taft*, 28 Mich. 289; *Toledo, W. & W. Ry. Co. v. Prince*, 50 Ill. 26; *Cincinnati, L. St. L. & C. Ry. Co. v. Davis*, 126 Ind. 99, 25 N. E. 878, 44 Am. & Eng. R. Cas. 459; *Terre Haute & I. R. Co. v. Stockwell*, 118 Ind. 98; *Union Pac R. Co. v. Winterbotham*, 52 Kan. 433

34 Pac. 1052; *Southern R. Co. v. Brister*, 79 Miss. 761, 31 So. 441; *Cairo & St. L. R. Co. v. Mahoney*, 82 Ill. 73.

**27.** *Pacific R. Co. v. Thomas*, 19 Kan. 256; *Indianapolis & St. L. R. Co. v. Marris*, 67 Ill. 295; *Tucker v. St. Louis, etc., R. Co.*, 54 Mo. 179; *Sevier v. Birmingham, S. & T. R. R. Co.*, 92 Ala. 258, 9 So. 405; *St. Louis A. & T. R. Co. v. Hoover*, 53 Ark. 377, 13 S. W. 1092; *Cooper v. New York Cent. & H. R. R. Co.*, 13 N. Y. Super. Ct. 276. And see *Terre Haute, etc., R. Co. v. McMurray*, 98 Ind. 358.

Power to employ a physician and surgeon for a person injured by a street car is included in the authority given to an agent of the street car company, in case of accident, "to see that those injured are taken somewhere where medical aid can be given."<sup>28</sup> While the company may be bound by agreement of its agents to pay for medical attendance upon injured employees, passengers and others, where the authority of the agents, express or implied, is sufficient, it cannot, however, be charged with the negligence of a surgeon so employed, if due precaution has been exercised in the selection. The railroad company having used reasonable care in his selection is not chargeable with his want of skill.<sup>29</sup>

**28.** *Hansecom v. Minneapolis St. R. Co.*, 53 Minn. 119, 20 L. R. A. 695, so held in the case of an "inspector" whose general duties were to supervise the conduct of other employees.

**29.** *Atchison, T. & S. F. R. Co. v. Zeiler*, 54 Kan. 340, 38 Pac. 282; *Pittsburgh, C., C. & St. L. R. Co. v. Sullivan*, 141 Ind. 83, 40 N. E. 138, 27 L. R. A. 840, holding that when the duty of furnishing medical aid to employees injured in the service of the road has been assumed by the company, it will be "liable only, if at all, for its negligence in the employment, in the first instance, of an incompetent person, and not for his negligence or tortious acts in the

treatment of his servants" who have accepted his professional services. But if it appears that "the company was conducting a hospital with its own physician for the purpose of deriving profit therefrom, or if it contracted with" the employee "to furnish him with the services of a competent physician, and to properly treat him in case of an injury, it would be liable for the negligence or want of skill of its physician attending him." *Union Pac. R. Co. v. Artist*, 19 U. S. App. (8th C.) 612, 60 Fed. 365, 23 L. R. A. 581; *Richardson v. Carbon Hill Coal Co.*, 6 Wash. 52, 20 L. R. A. 338.

## CHAPTER XX.

**Principles of the Law of Negligence Applicable Generally in Actions against Street<sup>\*</sup> Railroad Companies for Personal Injuries.**

SECTION 461. Comparative negligence.

462. Injury avoidable notwithstanding contributory negligence — Last clear chance.

463. Where injury avoidable — Continued.

464. Contributory negligence of parents, guardians, or other custodians, imputed to children.

465. Contributory negligence — Proximate cause of injury.

466. Imputed or attributed negligence.

467. Imputed or attributed negligence continued — Application of rules.

468. Liability for negligence of contractors and lessees.

§ 461. Comparative negligence. — The doctrine of comparative negligence by which the negligence of the parties is compared in the degrees of "slight," "ordinary," and "gross," and a recovery permitted, when the plaintiff's negligence is slight and the negligence of the defendant is gross, but denied when the plaintiff is guilty of a want of ordinary care, or when the defendant's negligence is not gross, but only ordinary or slight as compared with plaintiff's contributory negligence, was first developed by the courts of Illinois as a common-law doctrine, and prevailed to its full extent only in Illinois.<sup>1</sup> It has since been repudiated by the courts of that State.<sup>2</sup> In a modified form the doctrine is

1. Galena, etc., R. Co. v. Jacobs, 20 Ill. 478; Toledo, etc., R. Co. v. Cline, 135 Ill. 41, 25 N. E. 846; Stratton v. Central City H. R. Co., 95 Ill. 25; Quincy H. R., etc., R. Co. v. Gnuse, 26 Ill. App. 397; Chicago City Ry. Co. v. Lewis, 5 Ill. App. 242; Wabash, etc., R. Co. v. Wallace, 110 Ill. 114.

2. Calumet Elec. St. R. Co. v.

Nolan, 69 Ill. App. 104; Cicero & P. St. R. Co. v. Meixner, 160 Ill. 320, 43 N. E. 823, 31 L. R. A. 331; Illinois Cent. R. Co. v. Ashline, 56 Ill. App. 475; Kinnare v. Chicago, etc., R. Co., 56 Ill. App. 153, the doctrine of comparative negligence is not in force in Illinois, but one to recover for injuries from the negligence of another must have been in the exercise of or-

still maintained in Georgia, where the rule appears to be that the plaintiff cannot recover if he has been guilty of gross negligence, but if his contributory negligence is slight as compared with the negligence of the defendant, he may recover, but his contributory negligence operates in mitigation of the damages recoverable.<sup>3</sup> In an action in the latter State it was held that when negligence of defendant was shown, nonsuit was properly granted, where it appeared that deceased was not exercising that degree of care required under the circumstances existing at the time the injury was received.<sup>4</sup> The rule or doctrine of comparative negligence is not recognized by the courts of the other States, or by the Supreme Court of the United States, or by the courts of Canada.<sup>5</sup>

dinary care for his own safety, and his injuries must have been the result of such negligence.

3. *Willingham v. Macon & B. Ry. Co.*, 113 Ga. 374, 38 S. E. 843; *Western & A. R. Co. v. Ferguson*, 113 Ga. 708, 39 S. E. 306; *Central R. Co. v. Gleason*, 69 Ga. 200; *Thompson v. Central R. Co.*, 54 Ga. 509; *Macon & W. R. Co. v. Davis*, 27 Ga. 113; *Brunswick & W. R. Co. v. Wiggins*, 113 Ga. 842, 39 S. E. 551.

4. *Rowe v. Central of Georgia R. Co.*, 115 Ga. 929, 42 S. E. 219.

5. *Gothard v. Alamaga, etc., R. Co.*, 67 Ala. 114; *Carrington v. Louisville & N. R. Co.*, 88 Ala. 472, the gross negligence of the defendant does not overcome the defense of contributory negligence unless it was wanton, reckless or intentional; *Prescott, etc., R. Co. v. Rees, (Ariz.)* 28 Pac. 1134; *Denver Tramway Co. v. Reid*, 22 Colo. 349, 45 Pac. 378; *Rowen v. New York, etc., R. Co.*, 59 Conn. 364, 21 Atl. 1073, if the plaintiff has been guilty of a want of ordinary care contributing to the production of the injury, he cannot recover, although the defendant has been guilty of gross

and culpable negligence, if the act was not intentional and wanton; *Terre Haute, etc., R. Co. v. Graham*, 95 Ind. 286; *Louisville, etc., R. Co. v. Falvey*, 104 Ind. 409, 3 N. E. 389, 4 N. E. 908; *O'Keefe v. Chicago, etc., R. Co.*, 32 Iowa 467; *Atchison, etc., R. Co. v. Morgan*, 31 Kan. 77, 1 Pac. 298, 13 Am. & Eng. R. Cas. 499; *Kansas Pac. R. Co. v. Peavy*, 29 Kan. 169; *Fenneman v. Holden*, 75 Md. 1, 22 Atl. 1049; *Marble v. Ross*, 124 Mass. 44; *Hurt v. St. Louis, etc., R. Co.*, 94 Mo. 255, 7 S. W. 1; *Missouri Pac. R. Co. v. Fox*, 56 Neb. 746, 77 N. W. 130, 12 Am. & Eng. R. Cas. N. S. 863; *Omaha H. R. Co. v. Doolittle*, 7 Neb. 481; *Pennsylvania R. Co. v. Righter*, 42 N. J. L. 180; *Gieselmann v. Scott*, 25 Ohio St. 86; *Potter v. Warner*, 91 Pa. St. 367; *Long v. Township of Milford*, 137 Pa. St. 122, 20 Atl. 425; *Galveston, etc., R. Co. v. Thornsberry, (Tex.)* 17 S. W. 520; *Turner v. Fort Worth, etc., Co., (Tex.)* 30 S. W. 253; *Richmond & D. Ry. Co. v. Yeamans*, 86 Va. 860, 12 S. E. 946; *Sandy River Cannel Coal Co. v. Caudill*, 22 Ky. L. Rep. 1175, 60 S. W. 180; *Lockwood v.*

The law will not undertake an apportionment of fault between plaintiff and defendant in an action based on negligence, and where the negligence of each party contributed to the accident there can be no recovery.<sup>6</sup>

§ 462. **Injury avoidable notwithstanding contributory negligence — Last clear chance.** — Contributory negligence of a party injured will not defeat his action, if the defendant or its servants might by reasonable care and prudence have discovered his peril in time to save him, and thus have avoided the consequences of the injured party's negligence. In such a case the plaintiff's alleged contributory negligence could not be said to be the direct

Belle City. St. R. Co., 92 Wis. 97, 65 N. W. 866; *Tesch v. Milwaukee Elec. R. & L. Co.*, 108 Wis. 593, 84 N. W. 823; *Richter v. Harper*, 95 Mich. 221, 54 N. W. 768; *Lake Shore, etc., R. Co. v. Miller*, 25 Mich. 274; *Hurst v. Burnside*, 12 Oreg. 520, 8 Pac. 888; *Cassida v. Oregon, etc., R. Co.*, 14 Oreg. 551, 13 Pac. 438; *Wilds v. Hudson R. Co.*, 24 N. Y. 432, the question presented to the court, or the jury, is never one of comparative negligence as between the parties; nor does very great negligence, on the part of a defendant, so operate to strike a balance of negligence as to give a judgment to a plaintiff whose own negligence contributed in any degree to the injury. *East Tennessee, etc., Ry. Co. v. Aikin*, 89 Tenn. 245, 14 S. W. 1082; *East Tennessee, etc., Ry. Co. v. Hull*, 88 Tenn. 33, 12 S. W. 419; *Illinois Central R. Co. v. Dick*, 12 Ky. L. Rep. 772, 15 S. W. 665; *Kentucky Central R. Co. v. Thomas*, 79 Ky. 160, 42 Am. Rep. 208; *Inland & Seaboard Coasting Co. v. Tolson*, 139 U. S. 551, 6 Mackey, 39, 11 S. Ct. 653; *Railroad Co. v. Lockwood*, 17 Wall. (U. S.) 357; *McCallum v. Odette*, 7 Can. S. Ct. 36.

*G. Anderson v. Met. St. Ry. Co.*, 61 N. Y. Supp. 899, 30 Misc. Rep. (N. Y.) 104; *Menger v. Laur*, 55 N. J. L. 205, 20 L. R. A. 61, 26 Atl. 180; *Railroad Co. v. Elliott*, 28 Ohio St. 340; *Coal Co. v. Norton*, 24 Pa. St. 465; *Greenland v. Chaplin*, 5 Exch. 243, 19 L. J. Exch. 293; *Murphy v. City of Dayton*, 7 Ohio N. P. 227, 8 Ohio S. & C. P. Dec. 354. Contributory negligence is not a complete defense in bar to an action by a widow against a railway company for the death of her husband, alleged to have been caused by its negligence, but operates only in reduction or diminution of damages, where the negligence of the railway company was one of the proximate contributing causes to that injury, under Fla. Acts 1887, chap. 374, § 1, permitting a recovery from a railroad company for injuries, where the injured person and the agents of the company are both at fault, but requiring the damages to be diminished in proportion to the amount of default attributable to him. *Florida C. & P. R. Co. v. Foxworth*, 41 Fla. 1, 25 So. 338, 13 Am. & Eng. R. Cas. N. S. 469.

and proximate cause of the accident, but the defendant's negligence would be the proximate cause and would thus render it liable.<sup>7</sup> Though there was want of ordinary care in getting in front of a street car, if this does not contribute to the injury, but was a mere condition before the accident, the proximate cause of which is the negligence of the street railway, there may be a recovery.<sup>8</sup> It has been held in some jurisdictions that plaintiff

7. *Bedell v. Detroit Y. & A. A. Ry.*, 131 Mich. 668, 92 N. W. 349, 9 Det. Leg. N. 479; *Schneider v. Market St. Ry. Co.*, 134 Cal. 482, 66 Pac. 734; *Grand Trunk Ry. Co. v. Ives*, 144 U. S. 408, 12 S. Ct. 679, 36 L. ed. 485; *Costello v. Third Ave. R. Co.*, 161 N. Y. 317, 55 N. E. 897; *Bowen v. Southern Ry. Co.*, 58 S. C. 222, 36 S. E. 590; *McAndrews v. St. Louis & S. Ry. Co.*, 83 Mo. App. 233, where plaintiff went on the track without looking and listening, but at such a distance ahead of the car that the motorman in charge of the car, by ordinary care could have stopped the car after he had discovered plaintiff in a position of peril, the company is nevertheless liable for injuring him; *Kenyon v. New York Cent. R. Co.*, 5 Hun (N. Y.) 479; *Green v. Erie Ry. Co.*, 11 Hun (N. Y.) 333, the contributory negligence of an infant of tender years will not excuse gross want of care on the part of the defendant's servants; *Mapes v. Union Ry. Co.*, 56 App. Div. (N. Y.) 508, 67 N. Y. Supp. 358; *Totarella v. N. Y., etc., Ry. Co.*, 53 App. Div. (N. Y.) 413, 65 N. Y. Supp. 1044; *Gallagher v. Manchester St. Ry. Co.*, 70 N. H. 212, 47 Atl. 610, such a case was properly submitted to the jury and defendant's motion for a nonsuit properly denied; *Tait v. Buffalo Ry. Co.*, 55 App. Div. (N. Y.) 507, 67 N. Y. Supp. 403; *Flynn v. Louisville*

*Ry. Co.*, 23 Ky. L. Rep. 57, 62 S. W. 490; *Murphy v. Derby St. Ry. Co.*, 73 Conn. 249, 47 Atl. 120; *Laufer v. Bridgeport Traction Co.*, 68 Conn. 475, 37 Atl. 379; *Redford v. Spokane St. Ry. Co.*, 15 Wash. 419, 46 Pac. 650; *Maxwell v. Wilmington City Ry. Co.*, 1 Marv. (Del.) 199, 40 Atl. 945; *Weitzman v. Nassau Elec. R. Co.*, 33 App. Div. (N. Y.) 585, 53 N. Y. Supp. 905; *Baltimore City P. R. Co. v. Cooney*, 87 Md. 261, 39 Atl. 859, 11 Am. & Eng. R. Cas. N. S. 759; *Boentgen v. New York & H. R. Co.*, 36 App. Div. (N. Y.) 460, 55 N. Y. Supp. 847, the question of plaintiff's contributory negligence should be submitted to the jury; *Parkinson v. Concord St. Ry. Co.*, 71 N. H. 28, 51 Atl. 268, provided the injured person could not have escaped after discovering the approaching car.

A plaintiff may recover for injuries caused by a street car notwithstanding his own negligence, if such injuries were proximately caused by the omission of defendant's conductor and motorman, after having such notice of the plaintiff's danger as would put a prudent man upon his guard, to use ordinary care for the purpose of avoiding such injury. *Swanson v. Chicago City Ry. Co.*, 242 Ill. 388, 6 St. Ry. Rep. 451, 90 N. E. 210.

8. *Roberts v. Spokane St. Ry. Co.*, 23 Wash. 325, 63 Pac. 506; *Lee v.*

may recover in an action for negligence, notwithstanding his negligence directly contributed to his hurt, if the defendant by ordinary care could have prevented the accident.<sup>9</sup> In Arkansas, Iowa, Texas, Massachusetts, and Ohio, it is not sufficient that the employees in charge of a street car might by the exercise of reasonable care have become aware of the dangerous position of the party injured, in time to avoid striking him, but actual knowledge is essential to relieve the person injured from the effects of his previous negligence.<sup>10</sup> In Wisconsin it has been held that the failure of a motorman to exercise ordinary care for the safety of a driver whom he sees approaching the track, unconscious of the approach of the car, does not relieve the latter from the consequences of contributory negligence.<sup>11</sup> In Georgia a recovery cannot be had for injuries caused by an electric car because of the negligence of the motorman, where the person injured could easily have avoided the injury by the exercise of ordinary care.<sup>12</sup> It is a well-established rule of quite general application that a plaintiff who, by his own negligence, has placed himself in a dangerous position where an injury was likely to result, may still recover for such injury, if the defendant with knowledge, or such notice as is

Market St. Ry. Co., 135 Cal. 293, 67 Pac. 765; Citizens' St. R. Co. v. Hamer, 29 Ind. App. 426, 62 N. E. 658, 63 N. E. 778.

9. *Hutchinson v. St. Louis & M. R. Co.*, 88 Mo. App. 376; *Orr v. Cedar Rapids, etc., R. Co.*, 94 Iowa, 423, 62 N. W. 851, 1 Am. & Eng. R. Cas. N. S. 239; *McKeown v. Cincinnati St. R. Co.*, 2 Ohio Leg. N. 388; *Barry v. Burlington Ry. & L. Co.*, 119 Iowa 662, 93 N. W. 68, 95 N. W. 229.

10. *Johnson v. Stewart*, 62 Ark. 164, 34 S. W. 889; *Austin Dam, etc., R. Co. v. Goldstein*, 18 Tex. Civ. App. 704, 45 S. W. 600; *Lynam v. Union R. Co.*, 114 Mass. 87; *Siek v. Toledo Consol. St. R. Co.*, 9 Ohio C. D. 51, 16 Ohio C. C. 393; *Houston City St.*

*R. Co. v. Farrell*, (Tex. Civ. App.) 29 S. W. 942, 5 Am. Electl. Cas. 576; *Little Rock Traction & E. Co. v. Morrison*, 69 Ark. 289, 62 S. W. 1045, defendant knowing of danger not relieved, if car could have been stopped, had it not been defective, or motorman had been competent.

11. *Johnson v. Superior R. T. R. Co.*, 91 Wis. 233, 64 N. W. 753. But see *Little v. Superior R. T. R. Co.*, 88 Wis. 402, 60 N. W. 705, holding that a motorman who fails to exercise reasonable care to avoid injuring one who, by her own negligence, has placed herself in danger, is guilty of wanton and reckless conduct and the company is liable.

12. *Cain v. Macon Consol. St. R. Co.*, 97 Ga. 298, 22 S. E. 918. See

equivalent to knowledge, of plaintiff's danger, failed to exercise reasonable care by which the injury might have been avoided, unless his negligence was such that but for it the misfortune could not have happened, or unless the injury was the result of the concurrent negligence of both parties.<sup>13</sup> The doctrine of last

also *McLeod v. Graven*, (C. C. App., 6th C.) 19 C. C. A. 616, 43 U. S. App. 129, 73 Fed. 627.

**13.** *Baltimore Consol. R. Co. v. Rifcowitz*, 80 Md. 338, 43 Atl. 762; *Cincinnati St. R. Co. v. Whitcomb*, (C. C. App., 6th C.) 66 Fed. 915, 1 Ohio Dec. Fed. 5, 5 Am. Electl. Cas. 602; *North Baltimore Pass. Ry. Co. v. Arnreich*, 78 Md. 589, 28 Atl. 809; *Ennis v. Union Depot R. Co.*, 155 Mo. 20, 55 S. W. 878; *Owensboro City R. Co. v. Hill*, 21 Ky. L. Rep. 1638, 56 S. W. 21; *Cooney v. Southern Elec. Ry. Co.*, 80 Mo. App. 226, 2 Mo. App. Rep. 646; *Warren v. Union Ry. Co.*, 46 App. Div. (N. Y.) 517, 61 N. Y. Supp. 1009; *Rooks v. Houston, etc., R. Co.*, 10 App. Div. (N. Y.) 98, 41 N. Y. Supp. 824; *Davis v. People's R. Co.*, 67 Mo. App. 598; *Griffin v. Toledo, etc., Ry. Co.*, 21 Ohio C. C. 547, 11 Ohio C. D. 749, the fact that a deaf person was guilty of negligence in walking on the track of an electric railway company will not defeat his recovery if it appears that the motorman, after discovering such person's danger, and the fact that he paid no attention to warning signals, might, in the exercise of ordinary care, have stopped the car and thus have avoided the injury; *Watermolen v. Fox River Elec. Ry. & P. Co.*, 110 Wis. 153, 85 N. W. 663, where a motorman, approaching a crossing with his car running at a customary speed of eight to twelve miles an hour, sees the driver of a

wagon attempt to cross in front of the car when it is within 130 feet thereof, and immediately applies the brakes and attempts to stop the car, which is so nearly effected that it stops within a few feet after a collision with the wagon, the motorman is not guilty of such gross negligence as will authorize a recovery, without regard to contributory negligence of the driver; *Schoenholtz v. Third Ave. R. Co.*, 16 Misc. Rep. (N. Y.) 7, 37 N. Y. Supp. 682; *Read v. Brooklyn H. R. Co.*, 32 App. Div. (N. Y.) 503, 53 N. Y. Supp. 209, the evidence as to the accident and the question of negligence on the part of the plaintiff as well as that of the defendant may properly be submitted to the jury. *Czezewzka v. Benton-Bellefontaine R. Co.*, 121 Mo. 201, 25 S. W. 911; *Oliver v. Denver Tramway Co.*, 13 Colo. App. 543, 59 Pac. 79; *Brachfield v. Third Ave. R. Co.*, 29 Misc. Rep. (N. Y.) 586, 60 N. Y. Supp. 988; *Kelley v. Louisville R. Co.*, 20 Ky. L. Rep. 471, 46 S. W. 688; *Montgomery v. Lansing City El. R. Co.*, 103 Mich. 46, 61 N. W. 543, 29 L. R. A. 287, 5 Am. Electl. Cas. 471; *Baltimore Traction Co. v. Wallace*, 77 Md. 435, 26 Atl. 518, 21 Wash. L. Rep. 313; *Consol. Traction Co. v. Haight*, 59 N. J. L. (30 Vroom) 577, 37 Atl. 135.

Notwithstanding the previous negligence of a plaintiff if, at the time the injury was done, it might have been avoided by the exercise of rea-

clear chance has been approved and applied in a large number of cases in this country.<sup>14</sup> If after the defendant knew, or in the

sonable care on the part of the defendant, the defendant will be liable for the failure to exercise such care. *Carroll v. Connecticut Co.*, 82 Conn. 513, 6 St. Ry. Rep. 354, 74 Atl. 897, citing *Smith v. Conn. Ry. & L. Co.*, 80 Conn. 268, 270, 67 Atl. 888, 17 L. R. A. (N. S.) 707; *Grand Trunk Ry. Co. v. Ives*, 144 U. S. 408, 12 S. Ct. 679, 36 L. ed. 485; *Carrahar v. Boston & Northern St. Ry. Co.*, 198 Mass. 549, 85 N. E. 162, 126 Am. St. Rep. 461.

14. See note 6 St. Ry. Rep. 514, citing most of the following cases:

*Alabama*. — Collision with wagon, doctrine applied. *Birmingham Ry., Light & Power Co. v. Clarke*, 148 Ala. 673, 41 So. 829; *Birmingham Ry., Light & Power Co. v. Brantley*, 3 St. Ry. Rep. 1, 141 Ala. 614, 37 So. 698; *Birmingham Ry., Light & Power Co. v. Jones*, 153 Ala. 157, 45 So. 177.

*Arkansas*. — The contributory negligence of the driver of a horse does not prevent a recovery where the car could have been stopped before the accident if it had not been defective or the motorman had been competent. *Little Rock Traction & Electric Co. v. Morrison*, 69 Ark. 289, 62 S. W. 1045. Failure of motorman to use reasonable care to stop car after discovering peril of pedestrian, renders the company liable. *Ft. Smith Light & Traction Co. v. Barnes*, 5 St. Ry. Rep. 41, 80 Ark. 169, 96 S. W. 976.

*California*. — *Fox v. Oakland Consolidated St. Ry.*, 118 Cal. 55, 50 Pac. 25; *Lee v. Market St. Ry. Co.*, 135 Cal. 293, 67 Pac. 765; *Harrington v. Los Angeles Ry. Co.*, 2 St. Ry. Rep. 22, 140 Cal. 514, 74 Pac. 15; *Ben-*

*nischsin v. Market St. Ry. Co.*, 149 Cal. 18, 4 St. Ry. Rep. 63, 84 Pac. 420.

*Colorado*. — The doctrine of last clear chance cannot be invoked by a street railway company in an action for injuries to a driver in attempting to cross the track, it appearing that his back was toward the approaching car and that he was unaware of the danger. *Philbin v. Denver City Tramway Co.*, 4 St. Ry. Rep. 108, 36 Colo. 331, 85 Pac. 630.

*Connecticut*. — *Carroll v. Connecticut Co.*, 82 Conn. 513, 6 St. Ry. Rep. 354, 74 Atl. 897; *Smith v. Connecticut Ry. & L. Co.*, 80 Conn. 268, 67 Atl. 888, 17 L. R. A. (N. S.) 707.

*Delaware*. — *Heinel v. People's Ry. Co.*, 6 Penn. (Del.) 428, 67 Atl. 173; *Di Prisco v. Wilmington City Ry. Co.*, 4 Penn. (Del.) 527, 57 Atl. 906. If an injury was proximately caused by a street railway company's failure, after becoming aware of the danger of a child playing in the street, to use ordinary care to avoid injuring him, the child's contributory negligence was no defense.

*District of Columbia*. — *Hawley v. Columbia Ry. Co.*, 25 App. Cas. (D. C.) 7.

*Georgia*. — *Thomas v. Gainesville & D. Electric Ry. Co.*, 124 Ga. 748, 52 S. E. 801.

*Idaho*. — *Pilmer v. Boise Traction Co.*, 14 Idaho 527, 6 St. Ry. Rep. 514, 95 Pac. 432.

*Indiana*. — *Hammond W. & E. C. Electric St. Ry. Co. v. Eads*, 2 St. Ry. Rep. 254, 32 Ind. App. 249, 69 N. E. 555; *Indianapolis St. Ry. Co. v. Seerley*, 35 Ind. App. 467, 3 St. Ry.

exercise of ordinary care ought to have known, of the plaintiff's negligence he could have avoided the accident, but failed to do so,

Rep. 226, 72 N. E. 169; Indianapolis St. Ry. Co. v. Bolin, 39 Ind. App. 169, 5 St. Ry. Rep. 192, 78 N. E. 210; Indianapolis Traction & Terminal Co. v. Kidd, 5 St. Ry. Rep. 204, 167 Ind. 402, 79 N. E. 347; Grass v. Fort Wayne & W. V. Traction Co., 42 Inn App. 395, 5 St. Ry. Rep. 279, 81 N. E. 514.

*Iowa.* — Doherty v. Des Moines City Ry. Co., 137 Iowa 358, 114 N. W. 183; McDivitt v. Des Moines St. Ry. Co., 99 Iowa 141, 68 N. W. 595; Barry v. Burlington Ry. & Light Co., 119 Iowa 62, 93 N. W. 68; Powers v. Des Moines City Railway Co., 137 Iowa 730, 115 N. W. 494.

*Kentucky.* — Louisville Ry. Co. v. Hoskin's Admr., 4 St. Ry. Rep. 330, 28 Ky. L. Rep. 124, 88 S. W. 1087. Collision with vehicle. Paducah Traction Co. v. Sine, 33 Ky. L. Rep. 792, 111 S. W. 356; Louisville Ry. Co. v. Hulchcraft, 32 Ky. L. Rep. 429, 125 S. W. 983; Flynn v. Louisville Ry. Co., 23 Ky. L. Rep. 57, 62 S. W. 490.

The contributory negligence of a pedestrian does not preclude a recovery if the motorman discovered or could have discovered the pedestrian's danger and failed to use reasonable efforts to avoid injuring him. Owenboro City Ry. Co. v. Hill, 56 S. W. 21; Louisville Ry. Co. v. Edelen's Admr., 5 St. Ry. Rep. 334, 29 Ky. L. Rep. 1125, 96 S. W. 901.

If a motorman discovers a trespasser upon the track in time to prevent an injury but fails to exercise such care as is at his command, the company is liable without regard to contributory negligence. Floyd v. Pa-

ducah Ry. & Light Co., 24 Ky. L. Rep. 2364, 73 S. W. 1122.

*Maine.* — Atwood v. Bangor O. & O. T. Ry. Co., 91 Me. 399, 40 Atl. 67.

*Maryland.* — Even though a plaintiff was guilty of contributory negligence in attempting to cross the track, a street car company is liable for her injury if its servants could have avoided the accident by ordinary care after seeing her on the track or after being able by the exercise of care to discover her there or approaching it under circumstances of peril. Baltimore Traction Co. v. Wallace, 77 Md. 435, 26 Atl. 518; Baltimore Traction Co. v. Appel, 80 Md. 603, 31 Atl. 964; Baltimore Consolidated Ry. Co. v. Rifeowitz, 89 Md. 338, 43 Atl. 762.

Where a person, standing on the hub of a wagon wheel close to the track of a suburban electric railway, deliberately stepped backward upon the track of said railway and was injured, it was held that the doctrine of the last clear chance did not apply. State v. Cumberland & W. Electric Ry. Co., 106 Md. 529, 68 Atl. 197.

*Massachusetts.* — Burns v. Worcester Consol. St. Ry. Co., 193 Mass. 63, 5 St. Ry. Rep. 454, 78 N. E. 740.

*Michigan.* — Collision with vehicle. Bladecka v. Bay City Trac. & Elec. Co., 155 Mich. 253, 15 Detroit Leg. N. 965, 118 N. W. 963; Montgomery v. Lansing City Electric Ry. Co., 103 Mich. 379, 61 N. W. 543.

*Missouri.* — Watson v. Railway, 6 Am. Electl. Cas. 500, 135 Mo. 250, 34 S. W. 373; Wallack v. St. Louis Transit Co., 5 St. Ry. Rep. 689, 123 Mo. App. 160, 100 S. W. 496; Rodg-

the plaintiff can recover. In such case the subsequent negligence of the defendant in failing to exercise ordinary care to avoid in-

ers v. St. Louis Transit Co., 117 Mo. App. 678, 92 S. W. 1154; Benseick v. St. Louis Transit Co., 125 Mo. App. 121, 102 S. W. 587; Jett v. Central Electric Ry. Co., 2 St. Ry. Rep. 513, 178 Mo. 664, 77 S. W. 738; Barrie v. St. Louis Traction Co., 5 St. Ry. Rep. 672, 119 Mo. App. 38, 96 S. W. 233; Jager v. Metropolitan St. Ry. Co., 114 Mo. App. 10, 89 S. W. 62; Kelly v. Railroad, 101 Mo. 67, 13 S. W. 806.

The humanitarian doctrine only applies and authorizes a recovery where the injured party is ignorant or oblivious of the impending danger. Kinlen v. Metropolitan St. Ry. Co., 216 Mo. 145, 115 S. W. 523.

In order for a plaintiff to recover who has himself been guilty of negligence, the negligence of the defendant must be characterized by wilfulness, recklessness, or wantonness. Abbott v. Kansas Elevated Ry. Co., 121 Mo. App. 582, 97 S. W. 198; Recktenwald v. Metropolitan St. Ry. Co., 121 Mo. App. 595, 97 S. W. 557; Moore v. St. Louis Transit Co., 4 St. Ry. Rep. 658, 194 Mo. 1, 92 S. W. 390.

The humanitarian doctrine which obtains in Missouri is another name for the last clear chance doctrine and requires something more than ordinary negligence to support it, to wit, there must be an element of recklessness, wantonness, or wilfulness in the case as distinguished from mere ordinary negligence. Clancy v. St. Louis Transit Co., 4 St. Ry. Rep. 656, 102 Mo. 615, 91 S. W. 509.

The doctrine in this State is well settled that the party who has the

last clear opportunity of avoiding the accident is not excused by the negligence of anyone else. Meyers v. St. Louis Transit Co., 99 Mo. App. 363, 73 S. W. 379. And that although an injured party may have been guilty of negligence contributing to his injury in being on a railroad track, the company is still liable for the injury if it could have been prevented by the exercise of ordinary care on the part of the company after the discovery of the danger in which the injured party stood. Rapp v. St. Louis Transit Co., 190 Mo. 144, 88 S. W. 865.

A street railway company is liable even for injury to an intoxicated person if the motorman, after seeing such person upon the track, failed to use ordinary care and prudence to prevent injury. Goff v. St. Louis Transit Co., 5 St. Ry. Rep. 660, 199 Mo. 694, 98 S. W. 49; Werner v. Citizens' Ry. Co., 81 Mo. 368.

Person standing near track unloading material from wagon injured by approaching car, doctrine applied. Davies v. People's Ry. Co., 67 Mo. App. 598.

Collision of vehicle, doctrine applied. Cole v. Metropolitan St. Ry. Co., 133 Mo. App. 440, 113 S. W. 684; Felver v. Central Electric Ry. Co., 216 Mo. 195, 115 S. W. 980; Penseick v. St. Louis Transit Co. 125 Mo. App. 121, 102 S. W. 587; Klockenbrink v. St. Louis & N. R. Co., 172 Mo. 678, 72 S. W. 900; Peterson v. St. Louis Traction Co., 5 St. Ry. Rep. 684, 199 Mo. 331, 97 S. W. 860; Septowsky v. St. Louis Transit Co., 102 Mo. App. 110, 76 S. W. 693; Hanheide v. St. Louis Transit Co.

injuring the plaintiff becomes the immediate or proximate and

104 Mo. App. 323, 2 St. Ry. Rep. 619, 78 S. W. 820.

The doctrine of last clear chance does not apply where a person drives upon the street railway track before a car not more than seventy-five feet away and running at such a rate of speed that it could not be stopped by the motorman. *Fellenz v. St. Louis & S. Ry. Co.*, 2 St. Ry. Rep. 620, 106 Mo. 154, 80 S. W. 49.

The fact that the driver of a team failed to look back for an approaching street car will not defeat a recovery for injuries received from a collision where the motorman had the last chance to avoid the collision. *Union Biscuit Co. v. St. Louis Transit Co.*, 3 St. Ry. Rep. 578, 108 Mo. App. 297, 83 S. W. 288; *Recktenwald v. Metropolitan St. Ry. Co.*, 121 Mo. App. 595, 97 S. W. 557.

Contributory negligence in driving on a track without looking or listening does not preclude a recovery where the failure of the motorman to stop his car, which he easily could have done, was the proximate cause of the accident. *Kolb v. St. Louis Transit Co.*, 2 St. Ry. Rep. 611, 102 Mo. App. 143, 76 S. W. 1050; *Aldrich v. St. Louis Transit Co.*, 1 St. Ry. Rep. 449, 101 Mo. App. 77, 74 S. W. 141; *Degel v. St. Louis Transit Co.*, 1 St. Ry. Rep. 459, 101 Mo. 56, 74 S. W. 156; *Murray v. St. Louis Transit Co.*, 3 St. Ry. Rep. 573, 108 Mo. App. 501, 83 S. W. 995; *Flunck v. Metropolitan St. Ry. Co.*, 133 Mo. App. 419, 113 S. W. 694.

Pedestrian on street car track injured, doctrine applied. *Riggs v. Metropolitan St. Ry. Co.*, 216 Mo. 304, 115 S. W. 969; *Williams v. Metro-*

*politan St. Ry. Co.*, 5 St. Ry. Rep. 658, 114 Mo. App. 1, 89 S. W. 59.

*Nebraska.* — If the failure of a street railway company to use reasonable diligence to stop its car after seeing a person who is driving on the track, directly and immediately causes injury to him, the company may be held liable although the said person was negligent in driving on the track. *Omaha St. Ry. Co. v. Larson*, 2 St. Ry. Rep. 654, 70 Neb. 591, 97 N. W. 824.

*New Hampshire.* — *Hanson v. Manchester St. Ry. Co.*, 4 St. Ry. Rep. 685, 73 N. H. 395, 62 Atl. 595; *Larombe v. Boston & Maine R. R.*, 73 N. H. 247, 60 Atl. 684; *Little v. Boston & Maine R. R.*, 3 St. Ry. Rep. 603, 72 N. H. 502, 57 Atl. 920.

Although a party was negligent in selecting a driver or the driver was negligent at the time of an accident, a street railway company is liable for an injury if it could have prevented the same by the exercise of ordinary care. *Hanson v. Manchester St. Ry. Co.*, 4 St. Ry. Rep. 685, 73 N. H. 395, 62 Atl. 595.

A street railway company is liable for the death of a drunken man lying upon its tracks, located on the highway, where it neglected to use reasonable care to avoid injuring him. *Edgerly v. Union St. Ry. Co.*, 67 N. H. 312, 36 Atl. 558.

In the case of *Parkinson v. Concord St. Ry.*, 71 N. H. 28, 51 Atl. 71, it was held in an action to recover for injuries received while crossing a street railroad track that if the motorman could, after discovering the plaintiff's danger, by the exercise of care, have prevented the collision,

efficient cause of the accident, which intervenes between the acci-

while the plaintiff, after discovery of the approaching car, could not have escaped injury, the defendant's want of care, which, if exercised, would have prevented the injury, was its legal cause, while the plaintiff's negligence was the cause of the danger merely.

*New Jersey.* — *Camden G. & W. Ry. Co. v. Preston*, 59 N. J. L. 264, 35 Atl. 1119.

*New York.* — *Weitzman v. Nassau Electric R. Co.*, 33 App. Div. 585, 53 N. Y. Supp. 905; *McDonald v. Metropolitan City R. Co.*, 2 St. Ry. Rep. 788, 93 App. Div. 238, 87 N. Y. Supp. 699; *Green v. Metropolitan St. Ry. Co.*, 42 App. Div. 160, 58 N. Y. Supp. 1039; *Totarella v. New York & Queens County Ry. Co.*, 53 App. Div. 413, 65 N. Y. Supp. 1044.

*North Carolina.* — *Styles v. Receivers of Richmond & D. R. Co.*, 118 N. C. 1084, 24 S. E. 740; *Gunther v. Wickes*, 85 N. C. 310.

*Ohio.* — Deaf person negligently walking on track, doctrine applied. *Griffin v. Toledo & Maumee Valley Ry.*, 11 O. C. D. 1149.

*Tennessee.* — *Memphis St. Ry. Co. v. Haynes*, 3 St. Ry. Rep. 809, 112 Tenn. 712, 81 S. W. 374.

*Texas.* — *Dallas Consolidated Electric St. Ry. v. Connecticut*, 100 S. W. 1019, 6 St. Ry. Rep. 745, 18 Tex. Ct. Rep. 8.

In *Wisconsin* the rule that obtains in some jurisdictions does not apply, that if plaintiff was guilty of contributory negligence he may yet recover, if defendant discovered his peril in time to have avoided injuring him by the exercise of ordinary care; nor the rule that, notwithstand-

ing plaintiff's negligence, he may recover if defendant was guilty of gross negligence, speaking of fault not amounting to actual intent to injure, or that wanton disregard for the safety of others equivalent thereto sometimes called constructive intent; nor the rule that if plaintiff's negligence preceded that of the defendant in time, and the latter, by the exercise of ordinary care, could have avoided injuring the former and failed to do so, the negligence of the former is considered a condition, and the negligence of the latter the sole proximate cause of the injury, notwithstanding such condition was a mere continuance of the negligent act and concurred with defendant's fault at the instant of the accident to produce it. *Tesch v. Milwaukee Electric Ry. & Light Co.*, 108 Wis. 593, 84 N. W. 823; *Watermollen v. Fox Electric Ry. & Power Co.*, 110 Wis. 153, 85 N. W. 663.

*Virginia.* — *Richmond Passenger & Power Co. v. Gordon*, 2 St. Ry. Rep. 936, 102 Va. 498, 46 S. E. 772.

While the intentional doing of a wrongful act, regardless of the consequences which follow, may be included in the definition of the humanitarian doctrine, so also a failure to act so as to prevent injury to another, by a person who owes to the other the duty of ordinary care, is within the application of such doctrine as applied in *Missouri*. *Drogmund v. Metropolitan St. Ry. Co.*, 122 Mo. App. 154, 6 St. Ry. Rep. 21, 98 S. W. 1091, citing *Moore v. St. Louis Transit Co.*, 194 Mo. 1, 92 S. W. 390.

dent and the more remote negligence of the plaintiff.<sup>15</sup> "This principle has been styled the doctrine of 'last clear chance,' and is regarded as an exception to the general rule forbidding recovery by plaintiff guilty of contributory negligence. It is no departure from just principles, but a wholesome and human doctrine, to hold that if, after the defendant knew, or in the exercise of ordinary care ought to have known, of the plaintiff's negligence, he could have avoided the accident, but failed to do so, the plaintiff can recover. In cases of this class the subsequent negligence of the defendant in failing to exercise ordinary care to avoid injuring the plaintiff, becomes the immediate or proximate and efficient cause of the accident which intervenes between the accident and the more remote negligence of the plaintiff."<sup>16</sup> Although the action of the one injured may have been the primary cause of the injury, yet an action for such injury may be maintained, if it be shown that the defendant might by the exercise of reasonable care and diligence have avoided the consequences of the injured party's negligence.<sup>17</sup> "In the application of that doctrine it is not necessary to find that the negligence of plaintiff had ceased to operate before the accident occurred, and that, after it had ceased to operate, the defendant, with knowledge of plaintiff's danger due to his own negligence, had failed to take reasonable precautions to avoid injury to him. It was enough to call for the application of that doctrine that the motorman knew of plaintiff's danger in time to have avoided injury to him in the exercise of reasonable care, even though he was negligent in putting himself in a place of danger and continued to be negligent in not looking out for his own safety."<sup>18</sup> But this doctrine has been held not to apply where the negligence of the person injured is concurrent

**15.** Indianapolis Traction & Term. Co. v. Kidd, 167 Ind. 402, 5 St. Ry. Rep. 204, 79 N. E. 347; Grass v. Ft. Wayne & W. V. Traction Co., 42 Ind. App. 395, 5 St. Ry. Rep. 279, 81 N. E. 514.

**16.** Indianapolis Traction & Term.

Co. v. Kidd, 167 Ind. 402, 5 St. Ry. Rep. 204, 79 N. E. 347.

**17.** Pilmer v. Boise Traction Co., 14 Idaho 327, 6 St. Ry. Rep. 514, 95 Pac. 432.

**18.** Powers v. Des Moines City Ry. Co., 137 Iowa 730, 115 N. W. 494.

with that of the motorman; <sup>19</sup> where the plaintiff's negligence continues up to the moment of the injury and is the contributing cause.<sup>20</sup> In a recent case it is said: "The last chance rule should not be given as a hit-or-miss rule for every case involving negligence. It should be given with discrimination. \* \* \* Assuming that the defendant was negligent in not seeing the buggy on the track and in not avoiding the accident, yet the plaintiff's negligence was continuous and was concurrent at the very moment of the collision. It proximately contributed to the collision, for without it the collision would not have occurred. There was no new act of negligence by the defendant, which was independent of the concurrent negligence and which made the latter remote. Therefore, there was no place in the case for the doctrine of 'the last clear chance.'" <sup>21</sup> Thus, if the negligence of a plaintiff enters into the accident at the time of the injury and causes the accident, he cannot recover even though the company was also guilty of negligence.<sup>22</sup>

**§ 463. Where injury avoidable — Continued.** — The failure of a motorman on an electric railway to adopt reasonable precautions to prevent a collision with a pedestrian crossing the tracks of the railway company, is culpable negligence, though the pedestrian was guilty of a negligent act in attempting to cross the tracks.<sup>23</sup> A person crossing a track with the belief that he has time before a car reaches him is not a wrongdoer, so as to excuse the operator of the car from not exercising ordinary care to avoid injuring him,

**19.** *Ries v. St. Louis Transit Co.*, 179 Mo. 1, 2 St. Ry. Rep. 504, 77 S. W. 734.

The last clear chance doctrine does not apply where there is negligence of the defendant supervening subsequently to that of the plaintiff, as where his negligence is continuous and operative down to the moment of the injury, or where his negligence or position of danger is not discovered by the defendant in time to avoid the

injury. *Denver City Tramway Co. v. Cobb*, 164 Fed. 41.

**20.** *Robards v. Indianapolis St. Ry. Co.*, 32 Ind. App. 297, 1 St. Ry. Rep. 133, 66 N. E. 66, 67 N. E. 953.

**21.** *Drown v. Northern Ohio Trac. Co.*, 76 Ohio St. 234, 5 St. Ry. Rep. 806, 81 N. E. 326.

**22.** *Heinel v. People's Ry. Co.*, 6 Penn. (Del.) 428, 67 Atl. 173.

**23.** *O'Keefe v. St. Louis & S. R. Co.*, 81 Mo. App. 386.

though the fault of such person may preclude him from recovering damages for any injury that may result in part from his conduct.<sup>24</sup> The driver of a team placed in a state of peril by the negligence of persons in charge of an electric street car is not guilty of negligence which will prevent recovery for injuries, where the peril is increased by an effort in the exercise of ordinary care to avoid it, or in failing to lessen it or escape by the exercise of unusual courage and self-possession.<sup>25</sup> But, when the accident was not caused by the negligence of defendant's servants, although the injuries were increased by the failure of the driver to unhitch the horses when the car was pushed back in order to extricate plaintiff, he was not entitled to recover; since a right of action, under such circumstances, can only arise where the injury was inflicted or increased because of the doing or omission to do some act or acts, the doing of which or the omission to do which was other than the result of the error of judgment as to the means to be used in extricating the plaintiff.<sup>26</sup> This doctrine of last clear chance does not apply where the negligence of a street railway company in running over an intoxicated pedestrian and the negligence of the pedestrian are so concurrent that it is impossible to separate the conduct of the former from the injury itself.<sup>27</sup> Where a child struck by an electric car was thrown into the fender and carried a considerable distance, when he rolled off and was killed by being crushed under the wheels, it was held that, irrespective of whether the child was guilty of contributive negligence in the first instance, yet when he was thrown into the fender, of which the employees of the company had knowledge, the company became liable for any further injury which could have been prevented by the exercise of reasonable care, the question as to the

**24.** *Tesch v. Milwaukee Elec. Ry. & L. Co.*, 108 Wis. 593, 84 N. W. 823.

**25.** *Gibbons v. Wilkes-Barre & S. St. R. Co.*, 155 Pa. St. 279, 26 Atl. 417.

**26.** *Rhing v. Broadway & S. A. R. Co.*, 53 Hun (N. Y.) 321, 6 N. Y. Supp. 641, 25 St. Rep. (N. Y.) 563. See *Wagner v. Metropolitan St. Ry.*

*Co.*, 79 App. Div. (N. Y.) 591, 80 N. Y. Supp. 191; *Phelan v. Forty-Second St., St. M. & St. N. Ave. R. Co.*, 79 App. Div. (N. Y.) 548, 80 N. Y. Supp. 333.

**27.** *Richmond Traction Co. v. Martin's Adm'r*, 102 Va. 209, 2 St. Ry. Rep. 921, 45 S. E. 886.

existence of which should have been submitted to the jury. The rule of law thus held in New York is that, notwithstanding negligence on the part of the person injured, he may recover, if the railway company, after such negligence occurred, could by the exercise of ordinary care have discovered it in time to have avoided inflicting injury.<sup>28</sup> One crossing a street car track at a place other than a crossing is bound to use reasonable care not to obstruct the passage of the car unnecessarily, but he has the right to rely on a delay of the car in its progress to enable him to cross, if it becomes necessary, and contributory negligence cannot be predicated on a mere mistake of judgment on his part.<sup>29</sup> If an injury is caused by a motorman starting his car and running it against a wagon which had been upset in a previous collision with a car by the concurrent negligence of the driver, an action may be maintained for the injury in the second collision against the railroad company.<sup>30</sup>

**§ 464. Contributory negligence of parents, guardians, or other custodians imputed to children.** — The rule that the negligent conduct of a parent, guardian, or custodian in allowing a child *non sui juris* to be exposed to danger, which negligence is the proximate cause of the injury, is contributory negligence, which must be imputed to the child, and will bar the plaintiff from recovery

**28.** *Weitzman v. Nassau Elec. St. Ry. Co.*, 33 App. Div. (N. Y.) 585, 53 N. Y. Supp. 905; *Green v. Metropolitan St. Ry. Co.*, 42 App. Div. (N. Y.) 160, 58 N. Y. Supp. 1039, 65 App. Div. (N. Y.) 54, 72 N. Y. Supp. 524, 171 N. Y. 201, 63 N. E. 958, where defendant was knocked down by a cable car, and, after being dragged quite a distance, was run over; *Howell v. Rochester Ry. Co.*, 24 App. Div. (N. Y.) 502, 49 N. Y. Supp. 17; *Goodman v. Metropolitan St. Ry. Co.*, 63 App. Div. (N. Y.) 84, 71 N. Y. Supp. 177, in an action against a street railroad company for injuries received at

a crossing through the alleged negligence of defendant, it was error to charge that, if defendant could have avoided the accident by the use of reasonable care, it was liable, even if the accident was caused in the first instance by the carelessness of plaintiff.

**29.** *Lawson v. Metropolitan St. Ry. Co.*, 40 App. Div. (N. Y.) 307, 57 N. Y. Supp. 997; *affd.*, 166 N. Y. 589, 59 N. E. 1124.

**30.** *McDevitt v. Des Moines St. R. Co.*, 90 Iowa 141, 68 N. W. 595, 6 Am. & Eng. R. Cas. N. S. 106.

in an action brought by it for personal injuries, was early adopted, and is still maintained, in New York, and is sometimes referred to as the New York rule. The reason assigned for the rule is that the child stands in such a relation of privity to the negligent parent, guardian, or custodian as exists in law between master and servant and principal and agent and that the maxim *qui facit per alium facit per se* is directly applicable.<sup>31</sup> In an action in that State against a street car company for negligently injuring a child *non sui juris* in the custody of his father at the time of the accident, a charge that, if plaintiff could have crossed the street and avoided the car but for the carelessness of the defendant's driver and his impetuous driving, they must find for the plaintiff, was held to be erroneous, because eliminating the question of the contributory negligence of the father.<sup>32</sup> The New York rule is followed in a number of the other States.<sup>33</sup> In

**31.** *Hartfield v. Roper*, 21 Wend. (N. Y.) 615, 34 Am. Dec. 273, holding that parents permitting a child two years old to be in a public highway unattended are guilty of such contributory negligence as will defeat an action in the child's name for an injury done to it by the negligence of a traveler in the highway; *Ames v. Broadway & S. A. R. Co.*, 56 N. Y. Super. Ct. 3, 4 N. Y. Supp. 803; *Honegsberger v. Second Ave. R. Co.*, 33 How. Pr. (N. Y.) 193; *Levy v. Dry Dock, E. B. & B. R. Co.*, 58 Hun (N. Y.) 610, 12 N. Y. Supp. 485; *Weil v. Dry Dock, E. B. & B. R. Co.*, 119 N. Y. 147, 23 N. E. 487; *Cumming v. Brooklyn City R. Co.*, 104 N. Y. 669, 10 N. E. 855; *Ehrman v. Brooklyn City R. Co.*, 14 N. Y. Supp. 336; *Fallon v. Central Park, etc., R. Co.*, 64 N. Y. 13; *Stone v. Dry Dock, E. B. & B. R. Co.*, 46 Hun (N. Y.) 184; *Mangam v. Brooklyn City R. Co.*, 38 N. Y. 455; *Hyland v. Yonkers R. Co.*, 4 N. Y. Supp. 305; *Etherington v. Prospect Park, etc., R. Co.*, 88

N. Y. 641; *Smith v. Grand St., etc., R. Co.*, 11 Abb. N. C. 62; *Ihl v. Forty-Second St., St. M. & St. N. Ave. R. Co.*, 47 N. Y. 317; *Drew v. Sixth Ave. R. Co.*, 26 N. Y. 49; *Barry v. Second Ave. R. Co.*, 41 St. Rep. (N. Y.) 342; *Thurber v. Harlem Bridge, etc., R. Co.*, 60 N. Y. 326; *Juskowitz v. Dry Dock, E. B. & B. R. Co.*, 53 N. Y. Supp. 992; *Albert v. Albany R. Co.*, 154 N. Y. 780, 49 N. E. 1093.

See section 428, herein, as to contributory negligence of children.

**32.** *Lifschitz v. Dry Dock, E. B. & B. R. Co.*, 73 N. Y. Supp. 888, 67 App. Div. (N. Y.) 602.

**33.** *McGeary v. Easton R. Co.*, 135 Mass. 363; *O'Connor v. Boston, etc., R. Co.*, 135 Mass. 352; *Wright v. Malden, etc., R. Co.*, 4 Allen (Mass.) 283; *Roller v. Sutter St. R. Co.*, 66 Cal. 230, 5 Pac. 108; *Schierhold v. North Beach, etc., R. Co.*, 40 Cal. 447; *Pittsburgh, etc., R. Co. v. Vin- ing*, 27 Ind. 513; *Evansville, etc., R. Co. v. Wolf*, 59 Ind. 89; *Jefferson-*

Massachusetts where, in an action for the injury of a child three years and ten months old by being run over by one of defendant's street cars while trying to run across the street in front of the car, it appeared that the child's parents lived on a street in which defendant's line lay, and that about an hour before the accident the child's mother saw her in the yard of the house unattended, and that the yard had a gate which was always open, it was recently held that the evidence showed negligence on the part of the parent, precluding recovery.<sup>34</sup> But in federal courts and in other jurisdictions it is held that, in actions for damages for personal injuries caused by negligence, brought by an infant in its own right, the negligence of the parent, guardian, or custodian is not imputable to the child, because it is in no way responsible for the danger, had no volition in establishing the relation of privity with the person whose negligence it is sought to impute to it, and should not be charged with the fault of such person in allowing it to be exposed to danger which it had neither the capacity to know or avoid.<sup>35</sup> In Illinois the former rule has been discarded

ville, etc., R. Co. v. Bowen, 40 Ind. 545; Atchison, etc., R. Co. v. Smith, 28 Kan. 541; Ledie v. Lewiston, 62 Me. 468; Brown v. European, etc., R. Co., 58 Me. 384; McMahon v. Northern, etc., R. Co., 39 Md. 438; Baltimore, etc., R. Co. v. McDonnell, 43 Md. 534; Fitz Gerald v. St. Paul, etc., R. Co., 29 Minn. 336, 13 N. W. 168; Payne v. Humeston, etc., R. Co., 70 Tex. 584; Walters v. Chicago, etc., R. Co., 41 Iowa 71; Ekman v. Minneapolis St. R. Co., 34 Minn. 24; Dahl v. Milwaukee City Ry. Co., 62 Wis. 652, 22 N. W. 755; Toner's Adm'r v. South Covington, etc., St. Ry. Co., 22 Ky. L. Rep. 564, 58 S. W. 439.

34. Cotter v. Lynn & Boston R. Co., 180 Mass. 145, 61 N. E. 818.

35. Chicago G. W. R. Co. v. Kowalski, 92 Fed. 310, 34 C. C. A. 1, in a suit for damages for personal injuries, brought by an infant in its

own right, the fault or negligence of its parents cannot be imputed to it; Newman v. Phillipsburg H. Car Co., 52 N. J. L. 446, 19 Atl. 1102; Erie City Pass. R. Co. v. Schuster, 113 Pa. St. 412, 57 Am. Rep. 471, 6 Atl. 269; Winters v. Kansas City Cable R. Co., 99 Mo. 509, 12 S. W. 652; St. Claire St. Ry. Co. v. Eadie, 43 Ohio St. 91, 1 N. E. 519; Smith v. Newark Ice, etc., Co., 9 Ohio C. P. Dec. 283, there is in Ohio no such thing as imputed negligence; South Covington, etc., St. R. Co. v. Herrklotz, 20 Ky. L. Rep. 750, 47 S. W. 265, negligence of the parents of a child *non sui juris* cannot be imputed to the child in an action in its behalf to recover damages for personal injuries; Government St. R. Co. v. Hanlon, 53 Ala. 82; Daley v. Norwich, etc., R. Co., 26 Conn. 591; Westerfield v. Levis Bros., 43 La. Ann. 63, 9 So. 52; Barnes v.

and the latter rule now prevails. It was recently held that the negligence of the parent of a child six years old in allowing him to go across street car tracks with a boy eleven years old was not imputable to the child, so as to support the defense of contributory negligence to his action for injuries received through the negligence of the railway company.<sup>36</sup> The rule that the negligence of

Shreveport City R. Co., 47 La. Ann. 1218, 17 So. 782, a child under three years of age is not precluded from recovering for personal injuries caused by a street railroad company's negligence, although it was improperly in the street through the negligence of its parents; Shipley v. Village of Au Sable, 85 Mich. 280, 48 N. W. 584; Battishill v. Humphrey, (Mich.) 23 Am. & Eng. R. Cas. 597; Huff v. Ames, 16 Neb. 139; Bellefontaine, etc., R. Co. v. Snyder, 18 Ohio St. 400; Whirley v. Whitman, 1 Head (Tenn.) 610; Robinson v. Cone, 22 Vt. 213; Norfolk, etc., R. Co. v. Ormsby, 27 Gratt. (Va.) 455; Gulf City, etc., R. Co. v. McWhirter, 77 Tex. 356, 14 S. W. 26; Dan v. Citizens' St. R. Co., 99 Tenn. 88, 41 S. W. 339, a father does not lose the right to recover from a street railroad company for the death of a child *non sui juris*, killed by the negligence of the company, because he thoughtlessly or carelessly permitted the child to go out onto the street; Consol. Trac. Co. v. Behr, 59 N. J. L. 447, 37 Atl. 142, the negligence of a father in managing his team cannot be imputed to a daughter *sui juris*, who is riding with him; Bay Shore, etc., R. Co. v. Harris, 67 Ala. 6; Frick v. St. Louis, etc., R. Co., 75 Mo. 542; Boland v. Missouri R. Co., 36 Mo. 490; Phila., etc., R. Co. v. Long, 75 Pa. St. 257; Warren v. Manchester St. Ry. Co., 70 N. H. 352, 47

Atl. 735, a parent's negligence is not imputed to his children; Bergen Co. Trac. Co. v. Heitman, 61 N. J. L. 682, 40 Atl. 651, a street car company is not relieved from liability for its negligence in the management of a car, resulting in the death of a child of two years and three months to whom contributory negligence could not have been attributed, because the child was suffered to roam unattended in the public streets; Markey v. Consol. Trac. Co., 65 N. J. L. 82, 46 Atl. 573, a child who, by reason of its mental capacity, is *non sui juris*, is not to be charged with the negligence of the person in whose custody it is. But see *Rosencranz v. Lindell St. R. Co.*, 108 Mo. 9, 18 S. W. 890.

**36.** *Chicago City Ry. Co. v. Tuohy*, 196 Ill. 410, 63 N. E. 997; *Chicago West Division Ry. Co. v. Ryan*, 31 Ill. App. 621, cases may arise in which the negligence of the parent will be imputed to the child; it was formerly held, in *Chicago City Ry. Co. v. Wilcox*, 138 Ill. 370, 27 N. E. 899, that where a child of tender years is injured by the negligence of another, the negligence of his parents, even though present at the time of the accident, cannot be imputed to him so as to support the defense of contributory negligence to his suit for damages; and, in *Chicago City Ry. Co. v. Wilcox*, (Ill.) 24 N. E. 419, that the negligence of the child's parents in permitting him to stray beyond their

his custodians, whether parents or persons to whose care the child has been intrusted, is to be imputed to the child, is not, however, applicable where the injured child, although *non sui juris*, was not itself guilty of contributory negligence, has done nothing which in the case of an adult would have constituted negligence;<sup>37</sup> nor where the defendant, by the exercise of ordinary care, could have discovered the danger to the child in time to have avoided inflicting the injury.<sup>38</sup> It is also not applicable when the child is *sui juris*, or old enough to exercise a reasonable degree of care for its own safety, and thus, therefore, released from the immediate custody of its parents or guardian.<sup>39</sup> It then becomes a question whether the child has exercised ordinary care or was guilty of contributory negligence.<sup>40</sup>

immediate control into a place of danger cannot be imputed to the child.

**37.** *Huerzeler v. Central Cross-town R. Co.*, 20 N. Y. Supp. 676, 48 St. Rep. (N. Y.) 649, 1 Misc. Rep. (N. Y.) 136, the negligence of the parents of a child *non sui juris* will not prevent recovery by its father for its death from being run over by a street car, where the child was not itself guilty of contributory negligence; *Hennessey v. Brooklyn City R. Co.*, 6 App. Div. (N. Y.) 206, 39 N. Y. Supp. 805, but to make the rule applicable the infant must have done something which in the case of an adult would have constituted negligence; and in support of this application of the rule the latter case cited *Ihl v. Forty-Second St., etc., R. Co.*, 47 N. Y. 317; *Cumming v. Brooklyn City R. Co.*, 104 N. Y. 669, 10 N. E. 855; *Collins v. South Boston, etc., R. Co.*, 142 Mass. 301, 7 N. E. 856; *O'Brien v. McGlinchy*, 68 Me. 552; *Pittsburgh, etc., R. Co. v. Bumstead*, 48 Ill. 221; *McMahon v. Northern, etc., R. Co.*, 39 Md. 438.

**38.** *Passamanek v. Louisville Trac. Co.*, 98 Ky. 195, 32 S. W. 620, 17 Ky. L. Rep. 763, the contributory negligence of parents will not prevent recovery, if the driver by proper care and diligence could have discovered its presence on track in time to avoid injury; *Czezewzka v. Benton-Bellefontaine R. Co.*, 121 Mo. 201, 25 S. W. 911, recovery may be had by parents for the killing of their child under the age of two years by the negligent operation of a street car, although the mother was guilty of negligence in allowing the child to be upon the street, when its death could have been avoided by the exercise of ordinary care upon the part of the driver; *Meeks v. R. Co.*, 56 Cal. 513; *Baltimore, etc., R. Co. v. McDonnell*, 43 Md. 534, 551; *Galveston, etc., R. Co. v. Moore*, 59 Tex. 64, 10 Am. & Eng. R. Cas. 746.

**39.** *Lynch v. Smith*, 104 Mass. 52, 6 Am. Rep. 188; *Oakland R. Co. v. Fielding*, 48 Pa. St. 320; *McMahon v. New York*, 33 N. Y. 642; *R. Co. v. Gladmon*, 15 Wall. (U. S.) 401.

**40.** *Robinson v. Cone*, 22 Vt. 213;

**§ 465. Contributory negligence — Proximate cause of injury. —**

Where the testimony showed that after plaintiff had heedlessly walked in front of an approaching car she turned around on the track, instead of clearing it, as she could have done by taking another step, and stood with her back to the car, she could not recover, since, though the motorman did not stop the car as quickly as possible, the conduct of plaintiff was the proximate cause of the accident.<sup>41</sup> And where a person wishing to board a car at a curve placed himself in such a position that the motorman was unable to see him, and was hit by the swing of the rear part of the car in rounding the curve, his conduct was likewise so regarded.<sup>42</sup> Again, where a passenger leaving his seat in the car went to the platform to converse with another passenger, and then, instead of returning by way of the aisle, attempted to return by way of the running-board, when he was struck by a trolley post, it was held that his own negligence was the proximate cause of the injury.<sup>43</sup> And where plaintiff could have seen an approaching car at a distance of eight hundred feet and yet was upon the track when the car was only twenty-five feet away, his own negligence was held to be the proximate cause of the car striking him.<sup>44</sup> A requested instruction, in an action for the death of a fireman occasioned by collision of the fire truck on which he was riding and a street car, that, if the proximate cause of the collision was the negligence of the driver of the truck, and the collision would not have occurred had he exercised reasonable care, plaintiff could not recover, was bad — any contributory negligence of the driver not being imputable to deceased — because there may be more than one proximate cause of an acci-

Thurber v. Harlem Bridge Co., 60 N. Y. 326; Plumley v. Birge, 124 Mass. 257; Meibus v. Dodge, 38 Wis. 300, 20 Am. Rep. 6.

**41.** Aldrich v. St. Louis Transit Co., 101 Mo. App. 77, 74 S. W. 141, 1 St. Rep. 449, and notes.

**42.** Garvey v. Rhode Island Co.,

26 R. I. 80, 58 Atl. 456, 16 Am. Neg. Rep. 581.

**43.** Bridges v. Jackson Electric Ry., L. & P. Co., 86 Miss. 584, 4 St. Ry. Rep. 547, 38 So. 788.

**44.** Vibacchero v. Rhode Island Ry. Co., 26 R. I. 392, 3 St. Ry. Rep. 795, 59 Atl. 105.

dent.<sup>45</sup> The "proximate cause" of an event is that which in a natural and continuous sequence, unbroken by a new cause, produces that event, and without which that event would not have occurred. In cases of this kind the question as to what is the proximate cause of the injury is a question for the jury.<sup>46</sup> Where, in an action to recover damages for injuries alleged to have been caused by the defendant's negligence, it appears that there are two proximate causes of the injury, one the negligence of the defendant and the other an occurrence happening without fault on the part of the plaintiff, or the negligence of another not imputable to the plaintiff, the latter is entitled to recover.<sup>47</sup> Where plaintiff was injured in a collision caused by the failure of a brakeman to remember verbal orders, and it appeared that the system of operating trains by such verbal orders was inadequate and unsafe, it was held that the proximate cause of the accident was not solely the negligence of the brakeman, a fellow servant, but there was negligence of defendant concurring therewith, in operating its trains by an unsafe system.<sup>48</sup> In an action by a pedestrian, injured by being squeezed between two cars at a curve in the tracks, it was held that the unexpected lateral movement of the car, and the act of plaintiff in remaining between the cars, were the proximate causes of the injury.<sup>49</sup> Where plaintiff,

**45.** *Geary v. Met. St. Ry. Co.*, 84 App. Div. (N. Y.) 514, 82 N. Y. Supp. 1016, "if the request had been to instruct the jury that the plaintiff could not recover if the driver's negligence was the sole or only proximate cause of the accident, then it would have eliminated the defendant's negligence as a proximate cause, and have been equivalent to a request to charge that, if the accident was caused by the negligence of the driver, and the defendant was not negligent, or that any negligence on the part of the defendant was not a proximate cause, the defendant was not liable,

and the request would have been proper.

**46.** *Pilmer v. Boise Traction Co.*, 14 Idaho 327, 6 St. Ry. Rep. 514, 95 Pac. 432.

**47.** *Phillips v. N. Y. Cent., etc., R. Co.*, 127 N. Y. 657, 27 N. E. 978; *McCormack v. Nassau Elec. Ry. Co.*, 16 App. Div. (N. Y.) 24, 44 N. Y. Supp. 684; *Geary v. Met. St. Ry. Co.*, 84 App. Div. (N. Y.) 514, 82 N. Y. Supp. 1016.

**48.** *Sipes v. Puget Sound Elec. Ry.*, 54 Wash. 47, 6 St. Ry. Rep. 697, 102 Pac. 1057.

**49.** *Schwartz v. New Orleans & C. R. Co.*, 110 La. 534, 34 So. 667.

an infant, jumped from defendant's car, on which he was a trespasser, while it was in rapid motion, because he was frightened by defendant's conductor calling to him to get off, and he landed on a pile of sand and was uninjured by jumping, but his injury was received by reason of the sand giving away and causing him to slide under the car, the proximate cause of the injury was the conductor's negligence in ordering him to alight, and not the falling of the sand.<sup>50</sup> Where one is injured in a collision with a street car, he is entitled to recover, though there had been some negligence on his part, if the street railroad's negligence alone was the proximate cause of the injury, and his negligence did not enter into the accident at the precise time thereof.<sup>51</sup> In an action against a street railway company, where there was evidence of contributory negligence sufficient to take that question to the jury, an instruction that if the injury was caused by the concurring negligence of plaintiff and defendant's agents, and the negligence of neither, without the concurrence of the negligence of the other, would have caused said injury, plaintiff is not entitled to recover, was proper.<sup>52</sup> Where a buggy attached to a runaway horse is overturned by street car tracks negligently allowed to remain above the street level, the runaway cannot be said, as a matter of law, in an action against the car company, to be the proximate cause of an injury received by an occupant of the buggy, but the question of proximate cause is for the jury.<sup>53</sup> So, in an action

**50.** *Richmond Traction Co. v. Wilkinson*, 101 Va. 394, 43 S. E. 622.

**51.** *Cox v. Wilmington City Ry. Co.*, 4 Penn. (Del.) 162, 53 Atl. 569.

**52.** *Hornstein v. United Rys. Co. of St. Louis*, 97 Mo. App. 271, 70 S. W. 1105.

**53.** *Gray v. Washington Water Power Co.*, 27 Wash. 713, 68 Pac. 360. Where it appeared that deceased was killed while attempting to cross the track, and the motorman testified that when he first saw deceased he was emerging into the light thrown by the headlight, about ten feet in

front of it, and eight feet to the left of the track; there was testimony that the eyesight of deceased was bad; and from the testimony of a witness, together with that of the motorman, it appeared that the car, on stopping, passed over a distance of about forty-six feet, and that the means used by the motorman to stop the car was that of putting on the brake, but that he did not reverse the current; it appeared that the night was dark and the street badly lighted, and that no bell or gong was sounded; it could not be said, as a matter of

for damages in wrongfully causing the death of one in a public street, not a trespasser, although the evidence may show that the negligence of deceased in coming upon the track in a position of danger, in the first instance, contributed toward the collision, yet if there is evidence tending to show that the motorman in control of the car which caused the death saw the deceased in a position of danger, or, by the exercise of reasonable diligence, should have seen him in time to have stopped the car and avoided the death, the proximate cause of the death is one of fact for the jury.<sup>54</sup> Where it does not appear that the consequence of plaintiff's neglect could have been avoided by the use of ordinary care of the motorman, such neglect was the proximate cause of the injury.<sup>55</sup> And where it is not shown that, after an opportunity to discover plaintiff's peril, the defendant's servants neglected to use all appliances provided for checking the speed of a car and stopping it before the collision, plaintiff cannot recover.<sup>56</sup> In a suit for a personal injury against a street car company, where the negligence of the company is the direct cause of the injury, and it is aggravated by improper treatment by medical attendants, through no fault of the injured party or lack of care on her part in selecting attendants, the mere fact of such aggravation will not preclude a recovery for the injury.<sup>57</sup> One whose negligence proximately contributed to an injury to him by collision with a street car cannot recover, no matter how negligent the motorman may have been, unless the latter's negligence was such as to imply a wilful intention to inflict the injury.<sup>58</sup> The parents of a child injured by a street car cannot recover for negligence in running the car

law, that negligence of the deceased was the proximate cause of the injury. *Schneider v. Market St. Ry. Co.*, 66 Pac. 734, 134 Cal. 482.

**54.** *Metropolitan St. Ry. Co. v. Arnold*, 1 St. Ry. Rep. 228, 67 Kan. 260, 72 Pac. 857.

**55.** *Warren v. Bangor, etc., Ry. Co.*, 95 Me. 115, 49 Atl. 609, where plaintiff driving in a closed carriage at night collided with a street car.

**56.** *Hauselman v. St. Louis & M. R. Co.*, 88 Mo. App. 123.

**57.** *Chicago City Ry. Co. v. Cooney*, 95 Ill. App. 471; *affd.*, 63 N. E. 1029.

**58.** *DeLon v. Kokomo City St. R. Co.*, 22 Ind. App. 377, 53 N. E. 847, 1 Rep. 1050, 49 Cent. L. J. 7. The contributory negligence of a person injured is a bar to recovery of damages from the company because of its

at an excessive speed, where the child ran unexpectedly in front of the car, and the accident would have happened in the same way had the car been going at a reasonable speed, as the speed was not the proximate cause of the injury.<sup>59</sup>

§ 466. **Imputed or attributed negligence.**— We have already considered in another section the rule by which under certain circumstances the negligence of parents, guardians, or other custodians of a child is imputable to the child, so that under statutes allowing a recovery to the next of kin for the death of the child, the contributive negligence of those having custody of the child may be shown to defeat the recovery.<sup>60</sup> Where the relation of master and servant, or principal and agent, as between a person using a vehicle and the driver thereof, exists, or where the driver was under the express control of the person using the vehicle so that the driver was bound to obey orders given by him, the negligence of the driver is, as matter of law, to be imputed to the occupant of the vehicle; the master being liable for the acts of his servant and the principal for those of his agent. But where such relation does not exist between them, or the driver is not under control of the person using the vehicle, the negligence of the driver cannot be imputed to the occupant.<sup>61</sup> The doctrine of the courts generally is that the negligence of the driver of a vehicle which contributes to a collision with another vehicle will not be imputed to a passenger so as to bar his action against the owner of the other vehicle for injury suffered in the collision, unless the relation of master and servant existed between the driver and the passenger, or some other relation enabling the passenger to con-

gross negligence. *Bolsen v. Chicago Elec. Trans. Co.*, 31 Chic. Leg. N. 371.

59. *Holdridge v. Mendenhall*, 108 Wis. 1, 83 N. W. 1109. And see *Moore v. Lindell Ry. Co.*, 176 Mo. 528, 75 S. W. 672, 1 St. Ry. Rep. 492, and notes

60. See section 464, *ante*.

61. *Morris v. Met. St. Ry. Co.*, 63 App. Div. (N. Y.) 78, 71 N. Y. Supp.

321; *affd.*, 170 N. Y. 592, 63 N. E. 1119, holding that where deceased was seated with the driver of his father's carriage, but had no control over such driver, it was not error to instruct that he was not responsible for any negligence of the driver; *McCormack v. Nassau Elec. R. Co.*, 18 App. Div. (N. Y.) 333, 46 N. Y. Supp. 230; *Hajsek v. Chicago, B. &*

trol or influence the driver.<sup>62</sup> But, in all such cases, in order to recover for negligence, the plaintiff is bound to show that he himself was free from contributory negligence, it being the duty of the person so occupying a vehicle, where he has the opportunity to do so, as where he is seated alongside the driver of the vehicle, to exercise his faculties to discover approaching danger, and avoid it, if practicable, by communicating the fact to the driver, or otherwise.<sup>63</sup>

**§ 467. Imputed or attributed negligence continued — Application of rules.** — The negligence of the driver of a vehicle in colliding with a street car cannot be imputed to a person riding in the vehicle, by invitation of the driver, and having no control over

Q. R. Co., 68 Neb. 539, 94 N. W. 307. 609; *Read v. City & Suburban Ry. Co.*, 115 Ga. 366, 41 S. E. 629.

**62.** *Burleigh v. St. Louis Transit Co.*, 124 Mo. App. 724, 6 St. Ry. Rep. 752, 102 S. W. 721.

**63.** *Morris v. Met. St. Ry. Co.*, 63 App. Div. (N. Y.) 78, 71 N. Y. Supp. 321; *affd.*, 170 N. Y. 592, 63 N. E. 1119; *Brickell v. N. Y. Cent., etc., R. Co.*, 120 N. Y. 290, 24 N. E. 449, 17 Am. St. Rep. 648; *Flanagan v. N. Y. Cent., etc., R. Co.*, 70 App. Div. (N. Y.) 505, 75 N. Y. Supp. 225; *affd.*, 173 N. Y. 631, 66 N. E. 1108. If the person riding is a joint contributor with the driver to the hire of the team for the occasion, he is deemed negligent if he does not look for approaching cars on crossing a street car track in a suburban and thinly settled district of a city. *Shindelus v. St. Paul City Ry. Co.*, (Minn.) 83 N. W. 386; *Cass v. Third Ave. R. Co.*, 20 App. Div. (N. Y.) 591, 47 N. Y. Supp. 356. See also as to the rule stated in the text, *West Chicago St. R. Co. v. Dedloff*, 92 Ill. App. 547; *Chicago City Ry. Co. v. Wall*, 93 Ill.

App. 411; *Ulrich v. Toledo Consol. St. R. Co.*, 10 Ohio C. C. 635, 1 Ohio C. D. 111; *Hilts v. Foote*, 125 Mich. 241, 84 N. W. 138, 7 Detroit Leg. N. 489; *Cobb v. Met. St. Ry. Co.*, 56 App. Div. (N. Y.) 187, 67 St. Rep. (N. Y.) 104, 61 N. Y. Supp. 899; *Brennan v. Met. St. Ry. Co.*, 60 App. Div. (N. Y.) 264, 69 N. Y. Supp. 1025; *Koehler v. Rochester, etc., R. Co.*, 66 Hun (N. Y.) 566, 21 N. Y. Supp. 844; *Cain v. People's Pass. R. Co.*, 181 Pa. St. 53, 37 Atl. 110. Where the mistress of a school for small children, who owned and operated a conveyance in her business for conveying children to and fro between their homes and the school, procured a horse and driver from a livery stable keeper, for a stipulated price per month, she cannot recover damages for injuries to person and property sustained by her in a collision between her vehicle, driven by such driver, and a street car, without showing that the driver was free from negligence. *Reed v. Met. St. Ry. Co.*, 58 App. Div. (N. Y.) 87, 68 N. Y. Supp. 539; *Lewis v. Long Island R.*

the latter, where there is no claim that the driver was not competent.<sup>64</sup> So, where plaintiff was a guest of an experienced driver of an automobile, and there was no mutuality in a common enterprise, the driver's negligence, if any, in connection with a collision between an automobile and a street car, was not imputable to plaintiff.<sup>65</sup> The negligence of a husband or father cannot be imputed to the wife or child, but whether the wife or child themselves were negligent is a proper question to be submitted to the jury on the facts of the case.<sup>66</sup> Contributory negligence of the driver of a fire truck or hose cart which collided with a street car is not imputable to a fireman on the truck, killed by the collision, he neither having control over the driver nor being under his authority.<sup>67</sup> Where plaintiff employed a transfer company

Co., 162 N. Y. 52, 56 N. E. 548; revg. 32 App. Div. (N. Y.) 627, 53 N. Y. Supp. 1107.

**64.** Farley v. Wilmington & N. Elec. Ry. Co., 3 Penn. (Del.) 581, 52 Atl. 543; Robinson v. N. Y. Cent., etc., R. Co., 66 N. Y. 11; Dyer v. Erie Ry. Co., 71 N. Y. 228; Countryman v. F. J. & G. R. Co., 166 N. Y. 201; Johnson v. St. Paul City R. Co., 67 Minn. 260, 36 L. R. A. 586, 69 N. W. 900; Wosika v. St. Paul City R. Co., 80 Minn. 364, 83 N. W. 386; Louisville, etc., R. Co. v. Stommel, 126 Ind. 35, 25 N. E. 863; Met. St. Ry. Co. v. Powell, 88 Ga. 601, 16 S. E. 118; Phila., etc., R. Co. v. Hogeland, 66 Md. 147; Noonan v. Consol. Trac. Co., 64 N. J. 579, 46 Atl. 770; Bergold v. Nassau Elec. R. Co., 30 App. Div. (N. Y.) 438, 52 N. Y. Supp. 11; Zimmermann v. Union R. Co., 28 App. Div. (N. Y.) 445, 51 N. Y. Supp. 1; Leavenworth v. Hatch, 57 Kan. 57, 45 Pac. 65.

**65.** Chadbourne v. Springfield St. Ry. Co., 199 Mass. 574, 6 St. Ry. Rep 625, 85 N. E. 737.

**66.** Hennessy v. Brooklyn City R. Co., 73 Hun (N. Y.) 569, 26 N. Y.

Supp. 321; affd., 147 N. Y. 721; Hoag v. New York Cent., etc., R. Co., 111 N. Y. 199, 18 N. E. 648; Phillips v. New York Cent., etc., R. Co., 127 N. Y. 657; Citizens' Ry. Co. v. Washington, (Tex. Civ. App.) 58 S. W. 1042; Lewin v. Lehigh Valley R. Co., 41 App. Div. (N. Y.) 89, 58 N. Y. Supp. 113; Id., 52 App. Div. (N. Y.) 69, 65 N. Y. Supp. 49; Consol. Trac. Co. v. Behr, 59 N. J. L. (30 Vroom) 477, 37 Atl. 142.

**67.** Geary v. Met. St. Ry. Co., 84 App. Div. (N. Y.) 514, 82 N. Y. Supp. 1016; Galligan v. Met. St. Ry. Co., 33 Misc. Rep. (N. Y.) 87, 67 N. Y. Supp. 180; affg. 66 N. Y. Supp. 1131; Bailey v. Jourdan, 18 App. Div. (N. Y.) 387, 46 N. Y. Supp. 399; Kessler v. Brooklyn H. R. Co., 3 App. Div. (N. Y.) 426, 38 N. Y. Supp. 799; Weldon v. Third Ave. R. Co., 3 App. Div. (N. Y.) 370, 38 N. Y. Supp. 206; affd., 151 N. Y. 635, 45 N. E. 1135; Bergold v. Nassau Elec. Ry. Co., 30 App. Div. (N. Y.) 438, 52 N. Y. Supp. 11; Schemerhorn v. New York Cent., etc., R. Co., 33 App. Div. (N. Y.) 17, 53 N. Y. Supp. 279;

to convey her to a railway station, and exercised no control over the driver of the carriage, and she was injured by the overturning of the carriage in a collision with a street car by the concurrent negligence of the driver and the railway company, the driver's negligence was not imputable to plaintiff, so as to prevent her recovery against the railway company.<sup>68</sup> The negligence of the persons managing a street car is not to be imputed to a passenger therein who is killed or injured in a collision between the car upon which he is riding and a railway train or other vehicle.<sup>69</sup> In an action by a conductor of a horse car against the owner of a truck, to recover damages for injuries caused by collision, the concurring negligence of the driver of the car, who alone had charge of stopping and starting the horses to avoid collisions, is not imputable to the conductor.<sup>70</sup> Where a young girl was board-

Birmingham Ry. & Elec. Co. v. Baker, 132 Ala. 507, 31 So. 618, where the concurring negligence of the driver of a horse cart and employees in charge of a street car resulted in a collision injuring a fireman riding on the truck. Elyton Land Co. v. Mingea, 89 Ala. 521; Houston City St. R. Co. v. Reichart, 87 Tex. 539, 29 S. W. 1040. But see McGraff v. City & S. R. Co., 93 Ga. 312, 20 S. E. 317; Johnson v. Gulf, C. & S. F. R. Co., 2 Tex. Civ. App. 139.

As to contributory negligence, etc., in case of injury to firemen, see section 427, herein.

**68.** Frank Bird Transfer Co. v. Krug, 30 Ind. App. 602, 65 N. E. 309; Little v. Hackett, 116 U. S. 366, 6 S. Ct. 391, 29 L. ed. 652; Transfer Co. v. Kelly, 36 Ohio St. 86; Ry. Co. v. Shacklet, 105 Ill. 364, 44 Am. Rep. 791; Cuddy v. Horn, 46 Mich. 596, 10 N. W. 32, 41 Am. Rep. 178; City of Michigan City v. Boeckling, 122 Ind. 39, 23 N. E. 518; Brannen v. Gravel Road Co., 115 Ind. 115, 17 N. E. 202, 7 Am. St. Rep.

411; R. Co. v. Spilker, 134 Ind. 380, 33 N. E. 280, 34 N. E. 218; Bradley v. Ohio R. & C. Ry. Co., 126 N. C. 735, 36 S. E. 181; R. Co. v. Powell, 89 Ga. 601, 16 S. E. 118; R. Co. v. Cooper, 85 Ga. 939, 9 S. E. 321.

**69.** Little Rock & M. R. Co. v. Harell, 58 Ark. 454, 25 S. W. 117; O'Toole v. Pittsburgh & L. E. R. Co., 158 Pa. St. 99, 22 L. R. A. 606, 24 Pittsb. L. J. N. S. 125, 33 W. N. C. 208, 27 Atl. 737; Holzap v. New Orleans, etc., R. Co., 38 La. Ann. 185, 58 Am. Rep. 177; East Tenn., etc., R. Co. v. Markenz, 88 Ga. 60, 14 L. R. A. 281, 13 S. E. 855; O'Rourke v. Lindell R. Co., 142 Mo. 342, 9 Am. & Eng. R. Cas. N. S. 675, 44 S. W. 254; Hurley v. New York & B. Brew. Co., 13 App. Div. (N. Y.) 167, 43 N. Y. Supp. 259.

**70.** Hobson v. N. Y. Condensed Milk Co., 25 App. Div. (N. Y.) 111, 49 N. Y. Supp. 209; Seaman v. Koehler, 122 N. Y. 646, 25 N. E. 354; Bailey v. Jourdan, 18 App. Div. (N. Y.) 387, 46 N. Y. Supp. 399; Flaherty v. Minneapolis & St. L. R. Co.,

ing a street car when it started and she was dragged by holding onto the handrail; and her escort, running after the car, caught up with her and drew her from the steps, though he may not have exercised the best judgment in the emergency, his negligence, if any, was not to be imputed to the passenger.<sup>71</sup>

§ 468. **Liability for negligence of contractors and lessees.** — The law seems well settled that a street railroad company, organized under general laws, cannot lease its road and franchise to another company, or to an individual, without the consent of the legislature, so as to relieve it from its obligation to the public; and, when a lease is effected to another company, or an individual, without statutory authority, the law seems to treat the lessee as the agent of the railroad company, for the purpose of determining controversies between the public and such company, and the company, as well as the lessee, is liable for injuries caused by the negligence of the lessee.<sup>72</sup> But where the railroad company is authorized by law to lease its road to another railroad company, the company leasing its road is not liable for misconduct in the management, if the persons in charge at the time are not in fact its servants or agents, but are the servants or agents of the lessee, but the lessee alone is liable for its negligence.<sup>73</sup> Where one rail-

39 Minn. 328, 1 L. R. A. 680; Bunting v. Hogsett, 139 Pa. St. 363, 21 Atl. 31, 33, 34, 12 L. R. A. 268; Whelan v. New York, L. E. & W. R. Co., 33 Fed. 15.

71. Schoenfeld v. Met. St. Ry. Co., 40 Misc. Rep. (N. Y.) 201, 81 N. Y. Supp. 644.

72. Abbott v. Johnstown, etc., R. Co., 80 N. Y. 27; Fisher v. Met. Elev. Ry. Co., 34 Hun (N. Y.) 433; Woodruff v. Erie Ry. Co., 25 Hun (N. Y.) 246, 93 N. Y. 609; Durfee v. Johnstown, etc., R. Co., 71 Hun (N. Y.) 279, 54 St. Rep. (N. Y.) 526, 24 N. Y. Supp. 1016; Ricketts v. Birmingham St. Ry. Co., 85 Ala. 600, 5 So.

353; Railroad Co. v. Hambleton, 40 Ohio St. 496, 14 Am. & Eng. R. Cas. 126; Braslin v. Somerville H. R. Co., 145 Mass. 64, 32 Am. & Eng. R. Cas. 406. This rule applies, although a portion of a street car line operated in cities and towns is upon land owned by the railroad company so long as it constitutes a part of the road authorized by the municipality. Fort Worth St. R. Co. v. Ferguson, 9 Tex. Civ. App. 610, 29 S. W. 61.

73. Fisher v. Met. Elev. Ry. Co., 34 Hun (N. Y.) 483; Alexander & W. Ry. Co. v. Brown, 17 Wall. (U. S.) 445; Pinkerton v. Pa. Traction Co., 193 Pa. St. 229, 44 Atl. 284.

road company, in laying its tracks through a city street, left an obstruction therein, over which plaintiff fell and was injured, and subsequently leased its road to another corporation, which operated the same, in the absence of anything further to connect the lessee with the accident the lessee was not liable.<sup>74</sup> And the railroad company is liable where the injury occurred while the railroad was being operated by a construction company under its contract to operate the road satisfactorily for a period of time before delivering it to the street railroad company.<sup>75</sup> A street railway company, which employs an independent contractor to make an improvement on its road, and does not interfere with or control him in the manner of the execution of the work, is not liable for injuries to third persons, resulting from the negligence of a workman employed by the contractor.<sup>76</sup> But a joint judgment against a street railroad and a contractor doing work for it, requiring the tearing up of a city's streets, is proper, where, through negligence in placing a cord across the highway, it was rendered unsafe for travel, by reason whereof plaintiff was injured, whether the contractor be an independent one, or whether the servant of one or the other was the cause of the cord being there. The question of liability of an independent contractor has no application to a case of interference with the public streets, whether by digging trenches in them or by placing dangerous obstructions upon them. If the accident occurred because of some negligence in the actual doing of the work of construction of a subway, such as blasting or digging, or in the actual careless handling of the tools and implements on the part of the contractor's men, the company might be relieved of liability by the existence of an independent contract in the execution of which it had no share or control. But the company assumed a duty imposed on it by law, when it engaged in the work of tearing up a public street, equally

**74.** *Higgins v. Brooklyn, etc., R. Co.*, 54 App. Div. (N. Y.) 69, 66 N. Y. Supp. (100 St. Rep.) 334.

**75.** *Cogswell v. West St. & N. S. El. R. Co.*, 5 Wash. 46, 52 Am. & Eng. R. Cas. 500, 7 Am. R. & Corp. Rep.

48, 31 Pac. 411; *Chattanooga R. & C. R. Co. v. Liddell*, 85 Ga. 482, 11 S. E. 853, 8 Ry. & Corp. L. J. 296.

**76.** *Hauser v. Met. St. Ry. Co.*, 27 Misc. Rep. (N. Y.) 538, 58 N. Y. Supp. 286.

whether it embarked in the work itself or engaged a contractor to do it, viz., the duty of keeping the highway in a reasonably safe condition for travel while the work was in progress. That duty it owed to the public, and its liability, when established, rests upon its violation of that duty, and exists, although the specific act complained of may have been committed by the independent contractor. The same thing is true of the contractor. In taking a contract to dig up the street he also assumes and is subject to a legal obligation to see to it that the highway is maintained in a reasonably safe condition for public travel. He cannot escape this liability by showing that the mischief was done by a servant of his whom he temporarily loaned to another, for the liability rests upon the failure to discharge the duty which he owes to the public, and not at all upon his obligation to respond for his servants' fault.<sup>77</sup>

**77.** *Schiverea v. Brooklyn H. R. Co.*, 89 App. Div. (N. Y.) 340, 85 N. Y. Supp. 902; *Deming v. Terminal Ry. of Buffalo*, 169 N. Y. 1, 61 N. E. 983, 88 Am. St. Rep. 521; *Storrs v. City of Utica*, 17 N. Y. 104, 72 Am. Dec. 437; *Bruso v. City of Buffalo*, 90 N. Y. 679; *Turner v. City of New-*

*burgh*, 109 N. Y. 637, 16 N. E. 681; *Downey v. Low*, 22 App. Div. (N. Y.) 460, 60 N. Y. Supp. 947, *affd.*, 169 N. Y. 581, 62 N. E. 1096; *Murphy v. Perlstein*, 73 App. Div. (N. Y.) 256, 76 N. Y. Supp. 657; *Ann v. Hereter*, 79 App. Div. (N. Y.) 6, 79 N. Y. Supp. 825.

## CHAPTER XXI.

### Pleading.

SECTION 469. Pleading negligence of defendant.

470. Pleading negligence — Repugnancy.

471. Pleading negligence of defendant — Action by passenger.

472. Pleading negligence of defendant — Actions by pedestrians and others using streets.

473. Pleading negligence of defendants — Injuries to children.

474. Pleading negligence of defendant — Actions by employees.

475. Pleading contributory negligence of plaintiff.

§ 469. Pleading negligence of defendant. — As a general rule it is sufficient that the complaint, petition, or declaration, in an action against a street railroad company for personal injuries sustained through the negligence of the defendant, alleges, generally and substantially, that the injury was occasioned by the negligence of the defendant, or that the acts alleged of the defendant were the sole and proximate cause of the injury. Degrees of negligence are matters of proof and not of averment. The circumstances constituting the negligence are also matters of proof and not of averment.<sup>1</sup> It is sufficient as against a demurrer

1. *Cunningham v. Los Angeles St. R. Co.*, 115 Cal. 561, 47 Pac. 452, 1 Am. Neg Rep. 8; *San Antonio St. Ry. Co. v. Caillouette*, 79 Tex. 341, 15 S. W. 390; *Oldfield v. New York & N. H. R. Co.*, 14 N. Y. 310; *Nolton v. Western R. Co.*, 15 N. Y. 444; *Highland Ave. & B. R. Co. v. Robbins*, 124 Ala. 113, 27 So. 422, a complaint averring that defendant, a common carrier, did, through its servants, etc. carelessly and negligently run one of its trains against and over plaintiff a nineteen-months-old infant, while plaintiff was attempting to cross defendant's track at a point without the

limits of an unincorporated town, is not demurrable as failing to state specific acts of negligence on defendant's part, or knowledge by defendant's employees of plaintiff's presence on its tracks, or that plaintiff was not a trespasser.

Quite generally, however, the facts constituting the negligence are alleged in the complaint. — For example: A complaint which alleges that while plaintiff and her husband were attempting to cross defendant's tracks the horse became frightened and unmanageable; that one of the defendant's electric

for want of facts to characterize an act as having been negligently

cars was approaching at a distance of from 200 to 400 feet, and that the horse and buggy were in full view, and that defendant's servants saw the position of plaintiff in time to have averted the accident, but negligently failed to do so, whereby plaintiff was injured without fault on the part of herself or husband, stated facts sufficient to constitute a cause of action. *Citizens' St. Ry. Co. v. Damm*, 25 Ind. App. 511, 58 N. E. 564. A complaint alleging that plaintiff was driving east on a street when defendant's car turned into the same street running west; that her team became frightened when the car was 400 feet distant, and began to run backward, placing plaintiff in great danger of having her wagon upset, and herself injured; that, in place of stopping, defendant ran said car rapidly toward plaintiff, increasing the fright of the horses, and causing them to upset the wagon, whereby plaintiff was greatly injured; that plaintiff's team was well broken and gentle under all ordinary circumstances, and that said injuries occurred solely through the negligence of the defendant, in not stopping its car when the team became frightened, alleges a sufficient cause of action. *Ft. Scott Rapid Trans. Ry. Co. v. Page*, 10 Kan. App. 362, 59 Pac. 690.

**An allegation in a complaint to the effect** that the injury of which the plaintiff complains was caused "solely by the fault, carelessness, and negligence of the defendant and its servants and employees as aforesaid," is a sufficient allegation of negligence, and discloses that the injury sustained was the direct result

of the negligence imputed to the appellant, *Citizens' St. Ry. Co. v. Jolly*, 1 St. Ry. Rep. 157, and notes (Ind.), 67 N. E. 935. A petition which alleges that plaintiff was driver of a beer wagon; that he was run into by a street car of defendant street railroad company; that he stopped to listen before crossing the track; that he had reason to believe that the approaching car was traveling at the ordinary rate of speed, and that he would have ample time to cross the track, but that it was operated at an exceedingly high rate of speed, and that it was gross negligence to so operate it, and that the motorman made no effort to avoid the collision which might have been avoided, and that the collision was due directly to the fault of the defendant company, whereby plaintiff was seriously injured, states a cause of action. *Welty v. St. Charles St. Ry. Co.*, 109 La. 733, 33 So. 750.

**Where a declaration set forth the relation of passenger and carrier**, and averred that it was defendant's duty to use due care in providing suitable gates or other safeguards to prevent persons from falling between the cars, and that defendant failed to do so, by reason of which plaintiff was injured, the declaration was sufficient to support a verdict for plaintiff, as against a motion in arrest of judgment. *Lake St. Elev. Ry. Co. v. Burgess*, 200 Ill. 628, 66 N. E. 215; affg. 99 Ill. App. 499. The declaration in an action against a street railway company, alleging that defendant so negligently operated its car that it ran into plaintiff's wagon on the street, sufficiently

and carelessly done, and under such an allegation the specific facts

pleads the negligence. *Donohoe v. Wilmington City Ry. Co.*, 4 Penn. (Del.) 55, 55 Atl. 1011. The complaint of the plaintiff, to the effect that the sudden and violent starting of a car of the defendant caused the plaintiff's injury, and that the defendant, "without notice or warning to plaintiff, intentionally, purposely, and wilfully so started said car, utterly regardless of the safety or peril of the plaintiff, and with full knowledge of the fact that the natural and probable consequences of so starting said car under the circumstances, would be the fall and injury of the plaintiff," does not, however, state a cause of action for a wilful injury. A complaint which seeks redress for a wilful injury must aver that the injurious act was purposely and intentionally committed with the intent to wilfully and purposely inflict the injury complained of. An action for wilful injury being *quasi* criminal in its nature, the complaint should be strictly construed. *Union Traction Co. v. Lowe*, 1 St. Ry. Rep. 171, 31 Ind. App. 336, 67 N. E. 1021; *Indianapolis St. R. Co. v. Taylor*, 158 Ind. 274, 63 N. E. 456.

**Allegations in a complaint** to the effect that the defendant took up an old broken rail in its line of street railway at the place where the injury to plaintiff occurred, and put in a new rail, and so carelessly and negligently performed its work as to leave the street in a dangerous and unsafe condition, and the further allegation that the accident occurred without any fault or negligence on the part of the appellee, and wholly by reason of the negligence of said defendant, are

sufficient allegations as to the negligence of the defendant. *Citizens' St. Ry. Co. v. Marvil*, 1 St. Ry. Rep. 128, 161 Ind. 506, 67 N. E. 921.

**A statute, defining the liability of railroad companies** in certain cases, and providing for a presumption of negligence arising from the injury or damage, applies to street railroads, but does not change the rule of pleading negligence to the extent of permitting only an allegation of injury or damage by the running of the cars of defendant company. *Consumers' Elec. L. & St. R. Co. v. Pryor*, 44 Fla. 354, 32 So. 797. See also as to allegations of negligence. *Russell v. Huntsville Ry. L. & P. Co.*, 137 Ala. 627, 34 So. 855; *Koenig v. Union Depot Ry. Co.*, 173 Mo. 698, 73 S. W. 637; *Meyers v. St. Louis Trans. Co.*, 99 Mo. App. 363, 73 S. W. 379; *Southern Elec. Ry. Co. v. Hageman*, (U. S. C. C. A., Mo.) 121 Fed. 262, 57 C. C. A. 348; *Newton v. People's Ry. Co.*, 4 Penn. (Del.) 350, 55 Atl. 2; *Mobile St. Ry. Co. v. Waters*, (Ala.) 33 So. 42; *Moore v. Nashville, C. & St. L. Ry.*, 137 Ala. 495, 34 So. 617.

**Right to amend complaint** so as to allow the question of defendant's negligence to be submitted to the jury. See *Williams v. New York & Queens Co. Ry. Co.*, 97 App. Div. (N. Y.) 133, 3 St. Ry. Rep. 713, 89 N. Y. Supp. 659.

**Allegations that defendant negligently ran its car at a high rate of speed** into an open switch off the track and against a pole, throwing plaintiff upon the floor of the car and against a stove, thereby injuring him, sufficiently allege that

defendants's negligence was the proximate cause of the accident. *Indianapolis St. Ry. Co. v. Schmidt*, 163 Ind. 360, 3 St. Ry. Rep. 193, 71 N. E. 201.

**Burden of proof.**—A party alleging facts from which a presumption of negligence would arise has the burden of proving the existence of such facts. *Lincoln Traction Co. v. Shepherd*, 74 Neb. 369, 4 St. Ry. Rep. 677, 107 N. W. 764, 104 N. W. 882.

**Pleading humanitarian doctrine.**—In a case in Missouri the court said in this connection of a petition: "The pleader alleges no other cause than one based on the negligent act of running a car at a dangerously excessive rate of speed. True, he charges that the trainmen 'saw, or by the exercise of ordinary care and diligence could have seen, plaintiff in a position of imminent peril upon, approaching, and in close proximity to the track upon which said car was running, in time to have slackened the speed of said car, and to have stopped the same, and thus prevented the collision and consequent injuries to the plaintiff, had the said trainmen been operating and running said car at a reasonable rate of speed under the particular circumstances.' But this is not an allegation of a negligent breach of the humanitarian duty. The effort which a humane man would employ in a given situation to avoid the infliction of an injury upon his fellow does not spring from any consideration of the causes that brought that situation into being. The humane motive it not prompted nor affected by thought of who may be to blame for the existence of danger. It takes into account the facts only that one is endangered, and that injury may be prevented by

the exercise of reasonable care. The law justly imposes on the operators of powerful vehicles the duty of observing that degree of solicitude and care for the safety of others that an ordinarily humane person in their situation would treat as a self-imposed duty, and a failure to properly perform such duty is negligence; but a negligent act of this character is one thing, and a negligent act which aids in the production of a perilous situation is another and entirely different thing. As to the former, there can be no such thing as contributory negligence, since, however, foolhardy the endangered person may have been in plunging heedlessly into the toils, his negligence gives to the operators of the car no license to injure him; nor will they be heard to offer it as an excuse for their failure to do all that reasonably would have been expected of an ordinary humane person in their situation. Their negligence occupies the whole field of culpability, to the exclusion of all other acts of negligence, and presents itself as the sole producing cause of the resultant injury. *Ross v. Railway*, 5 St. Ry. Rep. 653, 113 Mo. App. 605, 88 S. W. 144. It cannot be regarded as being cooperative with the negligent acts which provided the condition of peril. As to the latter class of acts, the contributory negligence of the one endangered stands on the same footing with the negligence of the operators of the vehicle. In a sense, both parties may be considered as being in *pari delicto*, and, because both are guilty of the same kind of wrong, the one injured cannot have any right of action against his fellow wrongdoer. Of this character of negligence was the act of defendant in running the car at a dangerously high rate of

constituting the negligence may be given in evidence.<sup>2</sup> If the petition contains a statement of facts which constitute actionable negligence on the part of the defendant, it is not necessary to characterize the acts complained of by additional averments.<sup>3</sup> In charging negligence it is not necessary to allege that the persons in charge of the car were acting within the scope of their authority and duty it being sufficient to allege facts from which it may be inferred that the conductor and motorman were acting within the scope of their employment.<sup>4</sup> Where permanent injuries have not been alleged and the injuries alleged are not necessarily permanent, good pleading requires an allegation of their permanency.<sup>5</sup> Under an allegation that plaintiff's injuries "are permanent, and will leave him in a crippled condition for life," evidence has been held admissible of impairment of earning capacity.<sup>6</sup> Where, in an action for injuries for collision by a street car, the complaint simply charges negligence, evidence of a wilful intent

speed, and any cause of action attempted to be found on that act necessarily must fail, because of the presence of the contributory negligence of plaintiff. The only reasonable inference to be drawn from the averments of the petition is that the motorman could have prevented the injury by stopping the car or checking its speed, had it been operated at a reasonably careful rate of speed, but could not avoid the injury on account of the excessively high speed at which it was going. As we have just shown, the humanitarian duty deals only with the actual facts of a present situation, and has no concern with the question of what might have been done under different conditions. In thus restricting the scope of the cause pleaded, the averments of the petition fail to state a cause of action predicated on a violation of the humanitarian duty, and because of this omission, the learned trial judge erred in

refusing to sustain the demurrer to the evidence." *Grout v. Central Elec. Ry. Co.*, 125 Mo. App. 552, 6 St. Ry. Rep. 827, 102 S. W. 1026.

**Live wire suspended from roof of car** at rear of platform. Passenger injured by contact with. Sufficiency of declaration. *Hopkins v. Michigan Traction Co.*, 144 Mich. 359, 4 St. Ry. Rep. 521, 107 N. W. 909.

**2.** *Indiana Union Traction Co. v. McKinney*, 39 Ind. App. 86, 5 St. Ry. Rep. 260, 78 N. E. 203.

**3.** *San Antonio St. Ry. Co. v. Cailouette*, 79 Tex. 341, 15 S. W. 390.

**4.** *Indianapolis & Greenfield Rapid Trans. Co. v. Derry*, 33 Ind. App. 499, 3 St. Ry. Rep. 231, 71 N. E. 912.

**5.** *MacGregor v. Rhode Island Co.*, 27 R. I. 85, 3 St. Ry. Rep. 772, 60 Atl. 761.

**6.** *Terre Haute Elec. Co. v. Watson*, 33 Ind. App. 124, 3 St. Ry. Rep. 233, 70 N. E. 993.

to injure, or reckless disregard of plaintiff's safety, is held inadmissible.<sup>7</sup> In New York it has been held that a fact requisite to the cause of action may appear by implication as well as by express averment, but the intendment must be reasonable and fair. The liberal construction of a pleading enjoined by the Code applies only to matters of form; an ambiguous averment must still be taken against the pleader.<sup>8</sup> The Ohio courts have held that, when plaintiff in an action against a street railway company for personal injuries sets forth the facts complained of and denominates them "wilful conduct," if the facts so charged constitute negligence, the case should be submitted to the jury though the evidence is insufficient to establish wilful wrong;<sup>9</sup> and that, where in an action against an electric railway company there was no allegation of negligence in failing to lower the life-guard, the admission of evidence tending to show that the life-guard with which the car was equipped was not lowered was error;<sup>10</sup> and plaintiff in an action for personal injuries was required to make the petition more definite and certain by stating wherein and in what manner the defendant negligently ran its car against and over the plaintiff.<sup>11</sup> When the facts constituting the negligence are alleged in the complaint, unless there is also a general allegation that the injury resulted from the negligence of the defendant, the plaintiff may be precluded from proving any other facts showing the defendant's negligence than those alleged

**7.** *McClellan v. Chippewa Val. Elec. Ry. Co.*, 110 Wis. 326, 85 N. W. 1018.

A complaint alleging that a street railroad company "negligently and wilfully" permitted its turntable to be in an unsafe condition, whereby plaintiff was injured, was sufficient to withstand a demurrer, nothing in the complaint showing contributory negligence. *Ekman v. Minneapolis St. Ry. Co.*, 34 Minn. 24.

**Pleading wanton negligence.**— See *Birmingham Ry. L. & P. Co.*, 140 Ala. 312, 3 St. Ry. Rep. 20, 37 So. 289.

**8.** *Fahr v. Manhattan R. Co.*, 9 Misc. Rep. (N. Y.) 57, 29 N. Y. Supp. 1, 22 Wash. L. Rep. 595, 59 St. Rep. (N. Y.) 683, holding that a complaint is bad in substance which omits to charge the defendant with a negligent act causing the injury, or which shows that negligence of the plaintiff concurs with negligence of the defendant in causing the injury.

**9.** *Griffin v. Toledo & M. V.*

**10.** *Cleveland, P. & E. R. Co. v. Nixon*, 12 Ohio C. D. 79.

**11.** *Tuchochi v. Cincinnati St. R. Co.*, 7 Ohio Dec. 219.

in the complaint.<sup>12</sup> And if the facts alleged show upon their face that the plaintiff was guilty of contributory negligence, the pleading is demurrable.<sup>13</sup> Under a general denial, the defendant may introduce any proof showing that its negligence was not the sole cause of the injury, and that it was due to plaintiff's negligence, and where the answer contains a general denial, the defenses that whatever damages were sustained by the plaintiff were due to his contributory negligence, and that such injuries were sustained because of the negligence of a third person unknown to defendant, need not be specially pleaded, and, if pleaded, under the New York Code, the answer is demurrable.<sup>14</sup> In an action to recover damages, if special damages be claimed, they must be pleaded. The pleading, however, in this particular, may be somewhat general. Under a complaint in which it is alleged that the plaintiff "sustained serious and lasting bodily injuries and injuries to his head, limbs, and nervous system, as well as internal injuries," testimony of impaired eyesight and hearing resulting from the injury to the head is admissible.<sup>15</sup> Where, in a complaint against a street car company for injuries, plaintiff, a married woman, alleged that she could not in future properly attend to her household and other duties "and business," and, on the trial, the court permitted an amendment by adding, after the word "business," "of dressingmaking, and the loss of income therefrom by reason," etc., the amendment was held proper, the original allegation being sufficient to apprise defendant of a claim for special damages by reason of incapacity to attend to business.<sup>16</sup>

**12.** *West Chicago St. R. Co. v. Cantz*, 89 Ill. App. 309, where the declaration alleged that plaintiff was thrown from her wagon by collision, and there was evidence that she jumped from the wagon, the defendant is entitled to an instruction that if the jury believe from the evidence that she did jump from the wagon, the verdict should be for defendant.

**13.** *Richmond Traction Co. v. Hil-*

*debrand*, 98 Va. 22, 34 S. E. 888; *Highland Ave. & B. R. Co. v. Robbins*, 124 Ala. 113, 27 So. 422.

**14.** *Levy v. Met. St. Ry. Co.*, 34 Misc. Rep. (N. Y.) 220, 68 N. Y. Supp. 944; *Durst v. Brooklyn Heights R. Co.*, 33 Misc. Rep. (N. Y.) 124, 67 N. Y. Supp. 297.

**15.** *Mullady v. Brooklyn H. R. Co.*, 65 App. Div. (N. Y.) 549, 72 N. Y. Supp. 911.

**16.** *Buckbee v. Third Ave R. Co.*,

If the action is brought by the representative of the next of kin, under a statute authorizing such an action, where an injury results in death to their decedent, the complaint need not in any manner directly allude to the statute, but it must state all the facts which are requisite to bring the case within the statute.<sup>17</sup> If the action be brought upon a foreign statute, the rules appertaining to the pleading of a foreign statute in the forum must be observed.<sup>18</sup> Where a petitioner applies to sue as a poor person, it has been held in New York that it is not sufficient to show that the applicant does not own one hundred dollars of property. The moving papers must also set forth facts showing that he has a good cause of action. Mere advice of counsel, although a certificate of counsel to that effect is required, is insufficient to show a good cause of action. Nor is it sufficient for the petitioner to merely state that she has not now means to prosecute the action. The application is addressed to the sound discretion of the court, and a petitioner should make it appear by allegations of sufficient facts that unless the permission is granted, she will be unable to prosecute a good cause of action.<sup>19</sup> Under an allegation in a complaint to recover for personal injuries, after setting forth the injuries, that "some of the injuries are permanent," the defendant is entitled to a bill of particulars stating which are claimed to be permanent.<sup>20</sup> Where the complaint under its averments proceeds upon

64 App. Div. (N. Y.) 360, 72 N. Y. Supp. 217.

17. *Brown v. Harmon*, 21 Barb. (N. Y.) 508; *Safford v. Drew*, 3 Duer (N. Y.) 627; *Lucas v. New York Cent. R. Co.*, 21 Barb. (N. Y.) 245; *Kenney v. N. Y. Cent. & H. R. R. Co.*, 45 Hun (N. Y.) 535, 2 N. Y. Supp. 512.

18. *Throop v. Hatch*, 3 Abb. Pr. (N. Y.) 33; *Stallknecht v. Pennsylvania R. Co.*, 53 How. Pr. (N. Y.) 305.

19. *Weinstein v. Frank*, 56 App. Div. (N. Y.) 275, 67 N. Y. Supp. 746; *Kaufman v. Manhattan Ry. Co.*, 68

App. Div. (N. Y.) 94, 74 N. Y. Supp. 146.

20. *Cavanagh v. Met. St. Ry. Co.*, 70 App. Div. (N. Y.) 1, 74 N. Y. Supp. 1107. But under the allegation in a complaint that "the plaintiff was injured and bruised in his person and rendered sick, sore and lame," unaccompanied by an allegation of permanent injury, the defendant is not entitled to a bill of particulars of the "nature, location, and probable duration of each and every injury alleged in the complaint, except as specifically stated therein, showing particularly how plaintiff

the theory that two acts or grounds of negligence therein averred are combined or joined together to constitute the plaintiff's cause of action, then, under the circumstances, both acts of negligence must be proven on the trial before plaintiff is entitled to recover, but where several acts or grounds of negligence are sufficiently alleged in the complaint, a recovery on the trial will be justified if it be proven that the injury complained of was the result of one or more of said acts of negligence.<sup>21</sup>

**§ 470. Pleading negligence — Repugnancy.** — Where a pleading alleges two negligent acts, which are inconsistent and repugnant, as causing injury to a passenger, the plaintiff should be required to make an election. Thus it was so held where the petitioner alleged that the car started while the plaintiff was in the act of alighting and she was thereby thrown to the ground, and also alleged that the conductor allowed her to get off while the car was in motion.<sup>22</sup> So, where a petition alleged in two counts that the accident occurred in consequence of the motorman striking the plaintiff's son with a blunt instrument thereby breaking his handhold and causing him to fall off the running-board on which he was riding; and in two other counts stated that the accident occurred by running the car against and over him while he was on the street, and by the failure of the motorman to keep a vigilant watch for him as he approached the car, it was held that the petition was inconsistent and bad for repugnancy, and that the plaintiff should be required to elect on which he would proceed.<sup>23</sup>

**§ 471. Pleading negligence of defendant — Action by passenger.** — Where the complaint alleged that the car was stopped for the

was 'injured and bruised, and rendered sick, sore, and lame.' " English v. Westchester El. Ry. Co., 69 App. Div. (N. Y.) 576, 75 N. Y. Supp. 45.

<sup>21</sup> Fort Wayne & Wabash Valley Traction Co. v. Crosbie, 169 Ind. 281, 5 St. Ry. Rep. 249, 81 N. E. 474.

<sup>22</sup> Behen v. St. Louis Transit Co., 186 Mo. 430, 3 St. Ry. Rep. 472, 85 S. W. 346.

<sup>23</sup> Drolshagen v. Union Depot R. Co., 186 Mo. 258, 3 St. Ry. Rep. 489, 85 S. W. 344.

purpose of permitting plaintiff to leave it, and while he was alighting it was suddenly started; but plaintiff's proof was that the car did not stop entirely but was moving very slowly when it was suddenly started up, it was held that upon objection to the variance taken at the trial, the court could allow the complaint to be amended to conform to the proof.<sup>24</sup> Where, however, it was alleged as a foundation of the action that the car having stopped was started before the person seeking to become a passenger was able to get upon it, the fact of the stopping of the car was held to be essential to the case.<sup>25</sup> An allegation that a car came nearly to a standstill at the instance and request of the plaintiff, who then and there at the instance and request of defendant was then and there invited to become a passenger, is a statement of conclusion as to the knowledge had by defendant's servants as to the proximity of the plaintiff and his desire to become a passenger, and such pleading is bad on demurrer.<sup>26</sup> In Georgia it has been held that a declaration by a wife, stating the manner in which she was injured by a street railway company's negligence, and alleging that by reason of the fall sustained by her she was badly injured so that she suffered, and continues and will continue to suffer, great pain, and will remain permanently injured, and that the fall also caused great mental shame and distress, was sufficient to withstand a motion to dismiss it for vagueness, uncertainty, or indefiniteness, at the Trial Term.<sup>27</sup> That allegations that the company knowingly placed in charge of one of its passenger cars a conductor of bad character, who was drunk and armed with a pistol, and that while collecting fares he failed and refused to give a passenger correct change, and that upon request therefor he drew a pistol and fired at the passenger, but that the ball missed the passenger and struck the deceased who was passing on the

**24.** *Rosenberg v. Third Ave. R. Co.*, 47 App. Div. (N. Y.) 323, 61 N. Y. Supp. 1052, *affd.*, 168 N. Y. 681, 61 N. E. 1151.

**25.** *Savage v. Third Ave. R. Co.*, 29 App. Div. (N. Y.) 556, 51 N. Y. Supp. 1066. See *Patterson v. West-*

*chester El. R. Co.*, 26 App. Div. (N. Y.) 336, 49 N. Y. Supp. 796.

**26.** *Kennedy v. North Jersey St. Ry. Co.*, 72 N. J. L. 19, 3 St. Ry. Rep. 608, 60 Atl. 40.

**27.** *James v. Atlanta St. Ry. Co.*, 90 Ga. 695, 16 S. E. 642.

street, held not demurrable.<sup>28</sup> And if it be actionable *per se*, as against a street railway company for its conductor, in endeavoring to comply with the statute requiring the separation of white and colored passengers, to negligently mistake a white passenger for a colored one, and in the presence and hearing of others inform him that he must be seated in the portion of the car set apart for negro passengers, it is essential to the maintenance of such an action that the petition allege the plaintiff to be a white man.<sup>29</sup> The Alabama courts have held that a complaint in an action against a street railway company for personal injuries received while attempting to board one of its cars, which contained no allegation that the injury was received while attempting to board the train at a regular station, or at a place where it was usual or customary to receive passengers, or that the plaintiff was invited or knowingly permitted to attempt to board the train, or that he was in any manner accepted as a passenger, or that the injury was caused by the wanton or wilful negligence of the defendant, did not state a cause of action, notwithstanding an averment that he was in the act of getting on the train "as a passenger, as he had a right to do," as that is a mere conclusion of law;<sup>30</sup> that it is not necessary to aver in a complaint seeking to recover for causing the death of a passenger on a street car the name, or ignorance of the name, of the employee whose negligence caused the injuries, that allegations that said defendant then and there so negligently conducted said business, and that by reason of such negligence, plaintiff's intestate, while a passenger, received personal injuries which caused his death, are sufficient;<sup>31</sup> that a complaint in an action for damages against a street railway company which averred

**28.** Savannah Electric Co. v. Wheeler, 128 Ga. 550, 5 St. Ry. Rep. 133, 58 S. E. 38.

**29.** Wolfe v. Georgia Ry. & Elec. Co., 124 Ga. 693, 4 St. Ry. Rep. 156, 53 S. E. 239.

**30.** North Birmingham St. R. Co. v. Liddicoat, 99 Ala. 545, 13 So. 18. The complaint having alleged that plaintiff was at the time a passenger

on defendant's car when an assault was committed by one of its servants, it was not necessary to aver that it was committed within the scope of the servant's duty. Birmingham Ry. & Elec. Co. v. Mason, 137 Ala. 342, 34 So. 207.

**31.** Armstrong v. Montgomery St. R. Co., 123 Ala. 233, 26 So. 349.

that the car on which plaintiff was a passenger was "about to collide with" a locomotive, sufficiently alleged that a collision was imminent;<sup>32</sup> that in an action for injuries received by a passenger on alighting from a car, a complaint alleging the failure of the defendant to provide a safe place for alighting is not demurrable in not averring what constitutes a safe place, nor in giving a minute description of the place where the stop was made and of the alleged injuries;<sup>33</sup> that a complaint, alleging that defendant's agent negligently caused another car "to appear to be in imminent danger" of colliding with the car on which plaintiff was a passenger, whereupon she jumped, is defective in not showing that the appearance was such as to convince a reasonable person of the imminence of the danger;<sup>34</sup> that a complaint alleging in substance the relation of carrier and passenger, the payment of fare by the passenger, a collision between the car on which plaintiff was riding and a train of cars, and the negligence of the servants or agents in charge of the car, the proximate consequence of which resulted in injury to the plaintiff, is not demurrable on the ground that it does not specify with sufficient particularity the manner in which plaintiff was injured.<sup>35</sup> In Texas it has been decided that a petition in an action for personal injuries to a passenger, which charges that the car in which she was riding and a railroad car were so carelessly run and operated that a collision resulted, giving time, place, and in part the circumstances, though not the details, of the accident, is good on general demurrer;<sup>36</sup> and that the petition in a suit which alleged that the conductor invited the plaintiff on the car, and while it was in motion negligently ordered him to get

**32.** *Selma St. & Suburban Ry. Co. v. Owen*, 132 Ala. 420, 31 So. 598.

**33.** *Montgomery St. Ry. v. Mason*, 133 Ala. 508, 32 So. 261.

**34.** *Birmingham Ry. & Elec. Ry. Co. v. Butler*, 135 Ala. 388, 33 So. 33, also holding that an act by which plaintiff, a passenger, was injured, was done with "knowledge or notice" of defendant's agent, does not state

a cause of action for wantonness; notice not being the equivalent of knowledge, and the averment in the disjunctive not affirming either.

**35.** *Birmingham Ry. Light & P. Co. v. Adams*, 146 Ala. 267, 4 St. Ry. Rep. 21, 40 So. 385.

**36.** *Fort Worth R. Co. v. Ferguson*, 9 Tex. Civ. App. 610, 29 S. W. 61.

off, but did not diminish the speed, though knowing plaintiff was going to get off, so that in doing so plaintiff was injured, did not authorize a recovery on the ground of discovered peril.<sup>37</sup> Illinois courts hold that a complaint alleging that plaintiff was on defendant's horse car, ready to pay his fare, when he was pushed off by the driver, fails to state a cause of action, in the absence of an allegation that defendant was a common carrier;<sup>38</sup> that an allegation in an action for personal injuries by a passenger, that an obstruction causing a jerk of the car by which she was injured was "in and upon defendant's tracks," is a sufficient allegation that the obstruction was under defendant's control;<sup>39</sup> that a declaration alleging that plaintiff became a passenger on defendant's cars, and defendant did not use proper care to see that plaintiff should be carried safely, that it negligently ran its cars so near to a fixed structure that there was not room enough, unless standing very close to the car, when riding on the footboard, to be carried in safety, and that the plaintiff did not know of the existence of the fixed structure, and was not warned of it by defendant, and, while riding on the footboard, and using due care and caution for his safety, was unavoidably struck and injured, states a cause of action;<sup>40</sup> that, where plaintiff alleged that she was a passenger in defendant transfer company's cab, and that defendant street car company was under obligation to run its cars with due care, that defendants did not regard their said duties, but so carelessly, unskilfully, and negligently conducted themselves that by and through the negligence and default of their servants, and for want of due care and caution, "the cab was, by reason of the negligence" of defendants, run into by a street car which was running "at a high rate of speed, \* \* \* by means whereof" plaintiff was hurt, the question of the street car company's negligence was not, on issue joined, limited to the single element of the excessive speed of its car.<sup>41</sup> In the District of Columbia it

**37.** *Denison & S. Ry. Co. v. Carter*, 70 S. W. 322, 71 S. W. (Tex. Civ. App.) 292.

**38.** *Barger v. North Chicago St. R. Co.*, 54 Ill. App. 284.

**39.** *North Chicago St. R. Co. v. Schwartz*, 82 Ill. App. 493.

**40.** *West Chicago St. Ry. Co. v. Marks*, 182 Ill. 15, 55 N. E. 67.

**41.** *Springfield Consol. Ry. Co. v.*

is held that a declaration against a railroad company and a street railroad company for injuries to a passenger upon a street car at a crossing of their respective roads need not specifically aver that the gatekeeper, who is alleged to have negligently allowed the street car to be driven upon the railroad tracks, was a servant of the railroad company, or that the latter was bound to maintain the gate, when it alleges generally that the injury was occasioned by the negligence of the defendants or their servants.<sup>42</sup> In Indiana it is held that where a complaint stated that a conductor of defendant street railway company assisted a passenger to alight from his car, and then stepped on the car and on the passenger's skirt, which had not been removed from the steps, and that the car moved away with the conductor standing on the skirt, thereby pulling the passenger to the ground and inflicting the injuries for which the action was brought, it was not demurrable for want of facts;<sup>43</sup> that a complaint charging in general terms a railroad company with having carelessly and negligently started its car with a sudden jerk while a passenger was alighting from the car, which threw her to the ground and injured her, is sufficient, in the absence of a motion to make more specific.<sup>44</sup> In Montana it was held that in an action for personal injuries received in a collision between two street cars a complaint is not bad on a general demurrer because it avers that plaintiff was guilty of negligence in failing to switch each of its cars to await the passage of the other, where, from the various averments of the complaint, taken together, it is deducible that the track was a single one with switches, and that, by negligence of the gripman to use the switches so that the cars might pass one another, they collided.<sup>45</sup> In Washington negligence by a street railway company was held to be sufficiently averred by allegations of a complaint to the effect that

Puntenney, 200 Ill. 9, 65 N. E. 442; affg. 101 Ill. App. 95.

42. Washington & G. R. Co. v. Hickey, 23 Wash. L. Rep. (D. C. App. 177.

43. Citizens' St. R. Co. v. Shepherd, (Ind. App.) 59 N. E. 349.

44. South Chicago City Ry. Co. v. Zerler, 65 N. E. (Ind. App.) 599.

45. Hamilton v. Great Falls St. R. Co., 17 Mont. 334, 42 Pac. 860, rehearing denied, 17 Mont. 351, 43 Pac. 713.

a passenger was injured by reason of the collapse under her weight of a trapdoor in the floor of the rear platform of a car, and that the said collapse and injuries sustained were caused by the negligence of the company, its servants, and employees, in failing to properly secure, adjust, and fasten said trapdoor.<sup>46</sup> In New Jersey it was held that, where the declaration is for a breach of contract, an averment that the plaintiff was "on" a car and that thereby it became the duty of the company "to guard, protect, and secure the plaintiff while leaving the car," is not sufficient, as it fails to state any facts giving rise to such duty.<sup>47</sup> In Missouri it has been held that an allegation in a petition against a street railway company for injuries, that a passenger on a street car, as it approached a regular stopping place, notified the conductor of his wish to alight; that, in sight of the conductor, he stepped upon the lower step of the platform; that the car slackened speed, but did not stop, and immediately after passing the crossing the employees "carelessly and negligently suddenly increased its speed without giving plaintiff warning;" and that thereby plaintiff was thrown to the ground, etc., sufficiently pleaded the negligence of the company;<sup>48</sup> that it is not required of a passenger who is injured by some casualty to the vehicle or by defect in the appliances used in the transportation to allege the specific act of negligence which brought about the casualty. The averment that he was injured by a collision, derailment, breaking down of the vehicle, or by a defect in a given appliance, coupled with a general allegation of negligence, is enough to state a cause of action;<sup>49</sup> and that where a passenger in an action to recover for injuries sustained by him while being carried as a passenger chooses to allege in his petition the specific acts of negligence of which he complains, he assumes the burden of proving them, and, as in other cases, must recover, if at all, upon the negligence pleaded.<sup>50</sup> An allegation

**46.** *Washington v. Spokane St. R. Co.*, 13 Wash. 9, 42 Pac. 628.

**47.** *Breese v. Trenton Horse R. Co.*, 52 N. J. L. 250, 19 Atl. 204.

**48.** *Gorman v. St. Louis Trans. Co.*, 96 Mo. App. 602, 70 S. W. 731.

**49.** *McRae v. Metropolitan St. Ry. Co.*, 125 Mo. App. 562, 5 St. Ry. Rep. 636, 102 S. W. 1032.

**50.** *Hamilton v. Metropolitan St. Ry. Co.*, 114 Mo. App. 504, 5 St. Ry. Rep. 627, 89 S. W. 893.

in a petition against a street railroad company for injuries, that plaintiff boarded a car with the intention of becoming a passenger, is not equivalent to an allegation that he was a passenger, since the law does not concern itself with mere intent not evidenced by an outward act.<sup>51</sup> In Kentucky it was held that the averment in the petition that plaintiff was injured by the gross negligence of defendant street railway company in failing to have a conductor on its car is not equivalent to an averment that it was necessary to have a conductor on the car for the safe transportation of passengers, and is not sufficient to raise an issue of fact as to the necessity of having a conductor.<sup>52</sup> In an action for injury to a free passenger a complaint charging the company with liability as a common carrier held to state a cause of action.<sup>53</sup> In an action brought in the Municipal Court of the city of New York, where the pleadings are oral, it will be presumed that the action was for a neglect of the duty which was owing to the plaintiff as a passenger, and was not a mere action for personal assault, so as to deprive that court of jurisdiction. Once the relation of carrier and passenger is entered upon, the carrier is answerable for all the consequences to the passenger of the wilful misconduct or negligence of the persons employed by it in the execution of the contract which it has undertaken toward the passenger, and the assault of the individual becomes merely a part of the negligence of the defendant in the discharge of its duty to the plaintiff.<sup>54</sup>

**§ 472. Pleading negligence of defendant—Actions by pedestrians and others using streets.**—An allegation that while plaintiff was crossing a street the driver of defendant's horse car so negli-

51. *Raming v. Met. St. Ry. Co.*, 157 Mo. 477, 57 S. W. 268.

52. *Brown v. Louisville R. Co.*, 21 Ky. L. Rep. 995, 53 S. W. 1041.

53. *Indianapolis Traction & Term. Co. v. Lawson*, 143 Fed. 834, 74 C. C. A. 630, 4 St. Ry. Rep. 270.

54. *Hart v. Met. St. Ry. Co.*, 65 App. Div. (N. Y.) 493, 72 N. Y. Supp. 797; *Palmeri v. Manhattan Ry. Co.*,

133 N. Y. 261, 265. 30 N. E. 1001, 16 L. R. A. 136, 28 Am. St. Rep. 632; *Steamboat Co. v. Brockett*, 121 U. S. 637, 645, 7 S. Ct. 1039, 30 L. ed. 1049; *Baltimore, etc., R. Co. v. Barger*, 80 Md. 31, 45 Am. St. Rep. 322; *Haver v. Central R. Co.*, 62 N. J. L. 286, 41 Atl. 917, 43 L. R. A. 85; *Norfolk, etc., R. Co. v. Anderson*, 90 Va. 6, 44 Am. St. Rep. 886, 17 S. E. 759.

gently and carelessly managed his team that the horse knocked plaintiff down and injured his leg, was held a sufficient statement of a cause of action.<sup>55</sup> Where the complaint, in an action for injury resulting from the defective condition of a certain part of the street railway company's track, alleged that such road was operated by the defendant company, and the answer admitted the operation thereof, it was held to be error to dismiss the complaint, because the evidence failed to show that defendant was *prima facie* liable for the defective condition of the track.<sup>56</sup> An allegation in a complaint in a street car crossing accident case that plaintiff suffered the alleged injuries as the proximate consequence of the negligence of defendant, through its employees, in the management and control of its cars, is a sufficient allegation of negligence.<sup>57</sup> Negligence of a street railway company is sufficiently alleged to withstand a special demurrer, in a declaration averring that its servants so carelessly and improperly drove and managed a train of cars operated by an endless cable, that the motor and train ran into plaintiff's carriage, with great force and violence, crushing and destroying the same and rendering it of no value, without specifying more particularly the misconduct of the servants.<sup>58</sup> A complaint is not demurrable which alleges that plaintiff was driving his automobile on a street car track at night approaching a turn in the highway, when a trolley car came toward him around the curve, carrying an electric searchlight of great power which made it impossible to see in the vicinity; that he stopped his automobile, but the car continuing, he drove to the right, and finding himself still on the tracks and the car nearing him, he drove further to the right and struck a trolley pole near the west rail, with whose location he was unfamiliar. It is proper to strike from a complaint an allegation that a searchlight of the dimensions of the one in question is not allowed on trolley cars in certain cities, the injury in question having occurred in a sparsely

55. *Agnew v. Brooklyn City R. Co.*, 20 Abb. N. Cas. (N. Y.) 235.

56. *Schnell v. Metropolitan St. R. Co.*, 50 App. Div. (N. Y.) 616, 64 N. Y. Supp. 67.

57. *Birmingham Ry. & Elec. Co. v. Baker*, 132 Ala. 507, 31 So. 318.

58. *Chicago City R. Co. v. Jennings*, 157 Ill. 274, 41 N. E. 629.

settled part of the country.<sup>59</sup> Under a general allegation of negligence, evidence of a failure to give warning, by ringing of a bell or otherwise, is properly admissible; that, although a valid statute or ordinance limiting the rate of speed is admissible in evidence, its existence and violation should first be pleaded, and an averment that the car was running at a high rate of speed, contrary to law or to the provisions of a statute or ordinance, is not an allegation of the existence of the ordinance.<sup>60</sup> In an action for a personal injury caused by a collision between a wagon and a street car, an allegation in the declaration that the "team and wagon were driven with due care" is not necessary to a recovery, as it is enough if the plaintiff was in the exercise of due care.<sup>61</sup> Decisions in Minnesota hold that a complaint alleging that defendant's car which struck plaintiff was running at the rate of six miles an hour, and that plaintiff heard no bell rung, is insufficient to show negligence on defendant's part, in the absence of an allegation that six miles an hour is an unlawful or improper rate of speed, and that no bell was rung.<sup>62</sup> The Indiana courts have held that a complaint in an action against an electric railroad company, that defendant negligently ran its car against the wagon in which plaintiff's intestate was riding, is not demurrable on the ground that it fails to state a cause of action, although on motion it may be made more specific by setting forth the facts of the negligent act;<sup>63</sup> that a complaint that defendant's street railroad car was run at an excessive rate of speed, and that no care or diligence was exercised by defendant, sufficiently alleges a failure to give notice of the car's approach;<sup>64</sup> that a complaint alleging that plaintiff employed defendant transfer company to convey her in a carriage to a railway station, and that she was injured by reason of the negligence of the driver of the carriage in stopping it too

**59.** *Garfield v. Hartford & S. St. Ry. Co.*, 79 Conn. 458, 6 St. Ry. Rep. 130, 65 Atl. 598.

**60.** *Chicago W. D. Ry. Co. v. Klauber*, 9 Ill. App. 613; *Blanchard v. Michigan So. R. Co.*, 126 Ill. 416, 425.

**61.** *West Chicago St. R. Co. v. Dedloff*, 92 Ill. App. 547.

**62.** *Lydecker v. St. Paul City R. Co.*, 61 Minn. 414, 63 N. W. 1027.

**63.** *Citizens' St. R. Co. v. Lowe*, 12 Ind. App. 47, 39 N. E. 165.

**64.** *Citizens' St. R. Co. v. Albright*,

close to a street car track, and by reason of the further negligence of the street car company in failing to operate its cars so as to avoid a collision which occurred, sufficiently stated a cause of action against both defendants to withstand a demurrer for want of facts; <sup>65</sup> that a complaint in a personal injury suit against a street railway, which contained no other allegation of defendant's negligence than a statement at the close of the pleading that plaintiff's injuries in a collision were received through defendant's carelessness and negligence, was insufficient and demurrable, because not showing to what carelessness and negligence the injuries were attributed; <sup>66</sup> that the statement that a street car was running at a high rate of speed is not a sufficient allegation of negligence to support an action against a company for injuries received by a person run over by such car. <sup>67</sup> Where, as the general charge of negligence causing the injury was alleged, it was not necessary to repeat it in an amended petition charging the failure to give proper signals of the approach of the street car which struck plaintiff's intestate. <sup>68</sup> Where the plaintiff in a street railway crossing accident case contends that the person injured was *non sui juris*, such incapacity, being a matter of fact, should be pleaded. <sup>69</sup>

### § 473. Pleading negligence of defendants — Injuries to children.

— In Wisconsin it has been held that a complaint against a street railway company for injuries to a boy ejected from a car while it was running at high speed is not defective as showing the boy to be a co-employee of the conductor and motorman, so as to relieve the defendant from liability for the conductor's misconduct, in alleging the custom of the motormen to invite boys to get upon

14 Ind. App. 433, 42 N. E. 238, rehearing denied, 42 N. E. 1028.

65. Frank Bird Trans. Co. v. Krug, 30 Ind. App. 602, 65 N. E. 309.

66. South Chicago City Ry. Co. v. Moltrum, 26 Ind. App. 550, 60 N. E. 361.

67. Elwood Elec. St. Ry. Co. v. Ross, 26 Ind. App. 258, 58 N. E. 535.

68. Louisville Ry. Co. v. Will's Admr., 23 Ky. L. Rep. 1961, 66 S. W. 628.

69. Citizens' St. R. Co. v. Hamer, 29 Ind. App. 426, 62 N. E. 658; Id., 63 N. E. 778. A boy eight years old is presumed to be *non sui juris*, Costello v. Third Ave. R. Co., 161 N. Y. 317, 55 N. E. 897.

the cars to ride to a switch for the purpose of opening the same, and that plaintiff, with the permission and consent of the motorman, and in pursuance of such custom, got upon the lower step of the front platform for the purpose of riding to the switch, in the absence of any allegation that the plaintiff had any knowledge of such habit or custom of the motorman, or that he rode upon the cars for such purpose, or turned or aided in turning the switch, or had ever done so.<sup>70</sup> The Georgia courts have held that a complaint by a mother against a street car company for the killing of her minor son, who, in getting off from the car, was run over by a car going in the opposite direction, need not allege that the company had notice of the want of familiarity of such son with the running and operation of electric cars, or anything as to his size or appearance, nor that the point at which the son left the car was the regular stopping place, or that the stopping of the car was for the purpose of taking on or letting off passengers, or that he gave any notice of his desire or intention to leave the car, or that its servants had any notice of such intention.<sup>71</sup> In Alabama it has been held that an allegation that the defendant's servants recklessly and wantonly or intentionally caused a child to leave cars of a dummy line in a street while they were in motion was not sufficient to show negligence without anything to show that the conditions were not proper for the child to get off.<sup>72</sup> A Massachusetts case holds that in an action for causing the death of plaintiff's intestate, a child of seven years, the plaintiff cannot recover on a complaint which, although alleging that the "intestate lost his life by reason of the negligence and carelessness of the defendant in the operation of its street railway, and of the unfitness and gross negligence and carelessness of its servants and agents while engaged in its business," when taken as a whole shows no unfitness, gross negligence, or carelessness on their part, but does show

**70.** Hart v. West Side R. Co., 86 Wis. 483, 57 N. W. 91.

**71.** Augusta R. Co. v. Glover, 18 S. E. 406, 58 Am. & Eng. R. Cas. 269, 92 Ga. 132.

**72.** Jefferson v. Birmingham Ry. & El. Co., 116 Ala. 294, 22 So. 546, 38 L. R. A. 458.

wrongful conduct on the part of plaintiff's intestate while trespassing, contributing to the accident.<sup>73</sup> The rulings of Texas courts are that an allegation that plaintiff's child was seriously injured and permanently crippled through defendant's negligence is sufficient — the alleged injuries or the manner in which she was injured or crippled need not be described; <sup>74</sup> that the negligence of employees operating an electric car, resulting in the running over of a child on the track, is sufficiently alleged by averment showing that while the child was in plain view so that he could have seen by such employees if they had been careful, and the injury to him avoided, he was by their carelessness run over and killed, and the fact that the motorman had his back turned to the front of the car, which was the cause of his not seeing the child, need not be alleged.<sup>75</sup> In Illinois it is held that under a declaration, in an action for the death of a child by being run over by a street car, alleging wilful and wanton conduct in the management of the car, plaintiff may introduce evidence showing that the motorman did not ring his bell, even though there was no statute requiring a bell to be rung, and no averment in the declaration of a failure to ring the bell.<sup>76</sup> In Indiana it has been decided that a complaint in an action for personal injuries, alleging that the driver of a car left it and permitted the mules attached thereto to give a quick and sudden jerk of the car, moving it rapidly forward and throwing a child ten years of age from the rear platform, sufficiently avers negligence, where the child was rightfully on the car, as she was entitled to the protection of a passenger; <sup>77</sup> that a complaint in an action against a street car company for running over and killing a child, which alleges that the track was straight, and that the child was in plain sight of the motorman, is sufficient

**73.** *Gay v. Essex Elec. St. R. Co.*, 159 Mass. 238, 34 N. E. 258.

**74.** *San Antonio St. R. Co. v. Muth*, 7 Tex. Civ. App. 443, 27 S. W. 752.

**75.** *Austin R. T. R. Co. v. Cullen*, 30 S. W. (Tex. Civ. App.) 578, denying rehearing in 29 S. W. 256.

**76.** *East St. Louis Elec. R. v. Snow*, 88 Ill. App. 660; *West Chicago St. Ry. Co. v. Kriz*, 94 Ill. App. 277.

**77.** *Evansville St. R. Co. v. Meadows*, 13 Ind. App. 155, 41 N. E. 398.

to show his negligence, since it will be assumed that he saw the child in time to stop the car.<sup>78</sup> An allegation, in a complaint in an action for injury to a child struck by a street car, that the motorman negligently left his post, and negligently waved to the plaintiff, who was near the track, and who was a child of tender years and incapable by reason of his youth and want of discretion from understanding his danger of being struck by said car, so frightened the plaintiff as to cause him to start to run across said track in front of the car, was sufficient to show that the act of the motorman was within the scope of his employment.<sup>79</sup>

**§ 474. Pleading negligence of defendant — Actions by employees.** — In an action for an injury to an employee caused by a defective appliance there should be some averment to show that after the defendant was chargeable with knowledge of the defect it continued thereafter to use or permit the same to be used in the operation of the car. In this connection it has been declared that where there is a general charge that the defendant negligently failed or omitted to remedy the alleged defect, such a charge is sufficient to embrace or show the facts that the defendant had been afforded a reasonable time or opportunity to remedy the defect in question after its discovery.<sup>80</sup> In an action for injuries to a motorman, it was held that an amendment of his original petition, which stated that he was injured by a collision of cars, by alleging that he jumped from his car when he saw his position was perilous, was properly allowed as it did not change any allegation of negligence of the defendant.<sup>81</sup> An allegation denying the relationship of fellow servants is not necessary in an action for injuries to an employee, when the facts showing the relationship that did in fact exist are stated in the pleading.<sup>82</sup> In Indiana it is de-

**78.** *Elwood Elec. St. Ry. Co. v. Ross*, 26 Ind. App. 258, 58 N. E. 535.

**79.** *Wahl v. St. Louis Transit Co.*, 203 Mo. 261, 6 St. Ry. Rep. 96, 101 S. W. 1.

**80.** *Kentucky & Indiana Bridge &*

*R. Co. v. Moran*, 169 Ind. 18, 5 St. Ry. Rep. 272, 80 N. E. 536.

**81.** *Edge v. Southwest Missouri Elec. Ry. Co.*, 206 Mo. 471, 6 St. Ry. Rep. 106, 104 S. W. 90.

**82.** *Chicago City R. Co. v. Leach*, 80 Ill. App. 354.

cided that in all actions between master and servant under the common law wherein it may be inferred that the risk was assumed, it is necessary to a good complaint to allege facts of sufficient force to overcome the presumption, and that even under the Employers' Liability Act, the complaint should allege such a state of facts as will, at least, exhibit a mixed question of law and fact for the jury.<sup>83</sup>

§ 475. **Pleading contributory negligence of plaintiff.** — The rulings of the courts in the different States have generally fixed the practice in each State as to pleading contributory negligence on the part of the plaintiff in accordance with the rule adopted in such State as to the burden of proof, and hence, in those jurisdictions where proof is required on the part of the plaintiff of his freedom from negligence contributing to the injury, the averment as a rule must be made in the complaint, petition, or declaration; <sup>84</sup> and in jurisdictions where such proof is not required, it is not necessary for the plaintiff to allege the absence of contributory negligence on his part.<sup>85</sup> In some jurisdictions where the

83. *Indianapolis St. Ry. Co. v. Kane*, 169 Ind. 25, 5 St. Ry. Rep. 273, 80 N. E. 841, 81 N. E. 721.

84. *Potter v. Railroad Co.*, 20 Wis. 533, 91 Am. Dec. 444; *Railroad Co. v. Simmons*, 38 Ill. 242; *Railroad Co. v. Fullbright*, 7 Ohio L. J. 157; *West Chicago St. R. Co. v. Marks*, 182 Ill. 15, 55 N. E. 67; *Consol. St. R. Co. v. Maier*, 9 Ohio C. C. 268, a petition against a street car company by a boy of fifteen years in its employ, for personal injuries, must show that he did not know, or was incapable of appreciating, the danger of his employment.

85. *Mele v. Delaware, etc., Canal Co.*, 14 N. Y. Supp. 630; *Carrico v. W. Va. C. & P. R. Co.*, 35 W. Va. 389, 14 S. E. 12, 11 Ry. & Corp. L. J. 64; *Lee v. Troy Citizens' Gas L. Co.*, 98 N. Y. 115; *City of Orlando v. Heard*,

29 Fla. 581, 11 So. 182; *Thorpe v. Missouri Pac. R. Co.*, 89 Mo. 650, 2 S. W. 3; *Rolseth v. Smith*, 38 Minn. 14, 8 Am. St. Rp. 637; *Webb v. Big Kanawha & O. R. Packet Co.*, 43 W. Va. 800, 29 S. E. 519; *Thompson v. Great Northern R. Co.*, 70 Minn. 219, 72 N. W. 962; *Augusta R. Co. v. Glover*, 92 Ga. 575, 18 S. E. 406, 58 Am. & Eng. R. Cas. 269; *Hocum v. Wetherick*, 22 Minn. 152; *Smith v. Eastern R. Co.*, 35 N. H. 356; *Convoy v. Oregon Construction Co.*, 23 Fed. 71; *Holt v. Whatly*, 51 Ala. 569; *Lopez de Lopez v. Central Arizona Mining Co.*, 1 Ariz. 464; *Chicago & N. W. Ry. Co. v. Coss*, 73 Ill. 394, but holding that if the negligence of the plaintiff was slight, and that of the defendant gross, those facts must be averred; *May v. Inhabitants of Princeton*, 11 Metc. (Mass.) 442, even

burden of proof as to contributory negligence is on the plaintiff, it is held not to be necessary to allege in the complaint the absence of contributory negligence on the part of the plaintiff as a separate and distinct averment. The allegation that the injury was occasioned by the negligence of the defendant is held to involve the other, and to be equivalent to an allegation that the defendant's negligence was the sole cause of the injury.<sup>86</sup> In those States where the burden of proof is on the defendant, and in the federal courts which maintain the same rule, contributory negligence on the part of the plaintiff must be pleaded in the answer of the defendant as an affirmative defense.<sup>87</sup> In some States the statute expressly provides that in actions for negligence it shall not be necessary for the plaintiff to allege or prove the want of contributory negligence.<sup>88</sup> In Indiana such a statute has been held to be not in conflict with the constitutional provision prohibiting the passage of local or special laws regulating the practice in courts of justice.<sup>89</sup> And it has also been recently decided in this State that

where the plaintiff must prove that he was exercising ordinary care; *Lee v. Troy Citizens' Gas Light Co.*, 98 N. Y. 115; *Street R. Co. v. Noltheinus*, 40 Ohio St. 376, unless the other averments necessary to state a cause of action suggests the inference that the plaintiff may have been guilty of contributory negligence; *Lee v. Union Ry. Co.*, 12 R. I. 383; *Texas & Pac. Ry. Co. v. Murphy*, 46 Tex. 356, unless the averments of the petition, if unexplained, would establish a *prima facie* case of contributory negligence; *Baltimore & O. R. Co. v. Whittington*, 30 Gratt (Va.) 805; *Fowler v. Baltimore & O. R. Co.*, 18 W. Va. 579.

**86.** *Urquhart v. Ogdensburg*, 23 Hun (N. Y.) 75; *Melhado v. Poughkeepsie Trans. Co.*, 27 Hun (N. Y.) 99; *Lee v. Troy Citizens' G. L. Co.*, 98 N. Y. 115; *Hackford v. New York Cent. R. Co.*, 53 N. Y. 654. See also

New York cases cited in notes to section 459, *ante*.

**87.** *Roberts v. Terre Haute Elec. Co.*, 37 Ind. App. 664, 4 St. Ry. Rep. 254, 76 N. E. 323, 895; *Indianapolis & E. Ry. Co. v. Barnes*, 35 Ind. App. 485. 4 St. Ry. Rep. 219, 74 N. E. 583; *Brown v. Louisville Ry. Co.*, 21 Ky. L. Rep. 995, 53 S. W. 1041; *Kennedy v. Southern Ry. Co.*, 59 S. Car. 535, 38 S. E. 169; *Wise v. St. Louis Transit Co.*, 198 Mo. 546, 5 St. Ry. Rep. 611, 95 S. W. 898; *Smiley v. St. Louis & H. Ry. Co.*, 160 Mo. 629, 61 S. W. 667.

**88.** *Indiana Acts 1899*, p. 58.

**89.** *Indianapolis St. Ry. Co. v. Robinson*, 157 Ind. 232, 61 N. E. 197, 23 Am. & Eng. R. Cas. 181; *Citizens' St. R. Co. v. Jolly*, 1 St. Ry. Rep. 157, 161 Ind. 80, 67 N. E. 935. Prior to the passage of this act it was settled in Indiana that it must affirmatively appear from the complaint

such a statute does not change the common-law rule that where the facts alleged in the complaint show that plaintiff was guilty of contributory negligence, the complaint is insufficient on demurrer for want of facts.<sup>90</sup> The best formula for the expression of the fact of absence of contributory negligence on the part of the plaintiff is the general averment that the injured party was himself without fault.<sup>91</sup> In an action against a street railway company for injuries received by a passenger on alighting from a car, a plea attempting to set up contributory negligence by alleging that when the car stopped the lights from the car shone for ten or twelve feet on either side of the track, and that the plaintiff could have seen the alleged lumber and debris before he stepped thereon by the exercise of ordinary and reasonable care, is defective in not alleging that the plaintiff failed to exercise ordinary and reasonable care, or that he saw the lumber.<sup>92</sup>

that the injured party was free from contributory negligence. *Fort Wayne, etc., R. Co. v. Gruff*, 132 Ind. 13, 31 N. E. 460; *Braunen v. Railroad Co.*, 115 Ind. 115, 17 N. E. 202, 7 Am. St. Rep. 411; *Lake Erie, etc., R. Co. v. Arnold*, 26 Ind. App. 190, 59 N. E. 394; *Citizens' St. R. Co. v. Wagner*, 24 Ind. App. 556, 57 N. E. 49; *Lake Erie & W. R. Co. v. Hancock*, 15 Ind. App. 104, 43 N. E. 609; *Citizens' St. R. Co. v. Merl*, 134 Ind. 609, 33 N. E. 1014; *Citizens' St. R. Co. v. Albright*,

14 Ind. App. 433, 438, 42 N. E. 238, 1028.

**90.** *Indianapolis Traction & Term. Co. v. Pressell*, 39 Ind. App. 472, 4 St. Ry. Rep. 286, 77 N. E. 357.

**91.** *Fort Wayne, etc., R. Co. v. Gruff*, 132 Ind. 13, 31 N. E. 460; *Rogers v. Overton*, 87 Ind. 410; *Louisville, etc., Ry. Co. v. Sandford*, 117 Ind. 265, 19 N. E. 770.

**92.** *Montgomery St. Ry. v. Mason*, 133 Ala. 508, 32 So. 261.

**CHAPTER XXII.****Evidence.**

- SECTION 476.** Actions for injuries to passengers — Admissibility of evidence
477. Evidence in other actions — When admissible.
478. Evidence in other actions — When inadmissible.
479. Actions for injuries to passengers — Sufficiency of evidence generally.
480. Actions for injuries to passengers — Sufficiency of evidence — Instances.
481. Evidence in other actions — When sufficient.
482. Evidence in other actions — When insufficient.
483. Evidence as to contributory negligence.
484. Issues, proof and variance.
485. Admissibility of ordinances and statutes.
486. Opinion evidence as to rate of speed.
487. Opinion evidence to show time and distance within which vehicle may be stopped.
488. Expert and opinion evidence further considered.
489. Admissibility of declarations or admissions of street railway employees generally.
490. Declarations or admissions of street railway employees — Instances when admissible.
491. Declarations or admissions of street railway employees — Instances when not admissible.
492. Declarations as to injuries or suffering.
493. Declarations as to cause or manner of injury.
494. Intoxication as evidence of contributory negligence.

**§ 476. Actions for injuries to passengers — Admissibility of evidence.** — Generally, the admissibility of evidence in actions against street railroad companies is governed by the rules of evidence applicable to the particular form of the action. It is not practicable within the limits of this work to more than refer to many of the cases in which these rules have been applied.<sup>1</sup> As bearing

**1.** As to competency or admissibility of evidence to show negligence on the part of defendant, see *North Chicago St. R. Co. v. Kaspers*, 186 Ill. 246, 57 N. E. 849; *affg.*, 85 Ill. App. 316; *Chicago & A. R. Co. v. Hardie*, 85 Ill. App. 122; *Loudoun v. Eighth Ave. R. Co.*, 162 N. Y. 380, 56 N. E.

on the question of the negligence charged, that defendant so ran its car as by a sudden lurch thereof to throw plaintiff suddenly and violently out thereof, evidence of the condition of the track and the rails where the accident occurred is admissible.<sup>2</sup> In an action against a carrier for injuries sustained by being thrown on the floor of a car by a sudden stopping, a conversation which plaintiff had with the conductor on entering the car was competent to show that the company's servant knew that plaintiff was a cripple.<sup>3</sup> Where an action by a passenger against a street railroad company was defended on the ground the plaintiff received her injuries while intoxicated, and on account thereof, and it appeared that she was arraigned in court the next morning on the charge of intoxication, and the record showed a plea of guilty, but she denied having pleaded guilty and the officer who escorted her to the court testified that she asked him to plead for her, which he did; but he was not permitted to testify as to the plea he made, nor to admissions made to him by plaintiff as to her condition the night before, the exclusion of the officer's testimony was error.<sup>4</sup> In an action by a passenger against a carrier for injuries inflicted by a servant, evidence of the plaintiff's conduct provoking the

988, 16 App. Div. (N. Y.) 152, 44 N. Y. Supp. 742; *Blanchette v. Holyoke St. Ry. Co.*, 175 Mass. 51, 55 N. E. 485; *Olsen v. Citizens' Ry. Co.*, 152 Mo. 426, 54 S. W. 470; *North Chicago St. Ry. Co. v. Irwin*, 82 Ill. App. 146, evidence is inadmissible of other negligence than that alleged in the pleadings; *Wright v. Wilmington City R. Co.*, 2 Marv. (Del.) 141, 42 Atl. 440; *Baltimore City P. R. Co. v. Cooney*, 87 Md. 261, 39 Atl. 859, 11 Am. & Eng. R. Cas. N. S. 759; *Walsh v. Atlantic Ave. R. Co.*, 23 App. Div. (N. Y.) 19, 48 N. Y. Supp. 343; *Conner v. Citizens' St. R. Co.*, 146 Ind. 430, 45 N. E. 662, 7 Am. & Eng. R. Cas. N. S. 287; affg. 44 N. E. 16; *Owensboro City R. Co. v. Lyddane*, 1 Ky. L. Rep. 698, 41 S. W. 578; *Mul-*

*ler v. Met. St. Ry. Co.*, 78 N. Y. Supp. 1069; *Newport News & O. P. Ry. & El. Co. v. Bradford*, 3 Va. Sup. Ct. Rep. 15.

2. *Fitch v. Mason City & C. L. Tract. Co.*, 116 Iowa 716, 89 N. W. 33.

3. *Louisville, etc., R. Co. v. Bowlds*, 23 Ky. L. Rep. 1202, 64 S. W. 957.

4. *Link v. Brooklyn H. R. Co.*, 64 App. Div. (N. Y.) 406, 72 N. Y. Supp. 75. The principal question in an action for the ejection of a passenger from a street car being whether he was guilty of disorderly conduct, calling for interference of the conductor, it is error to admit evidence that thereafter he was arrested and charged with disorderly conduct at the time of the ejection, and was ac-

assault is admissible in mitigation of exemplary damages.<sup>5</sup> In an action for ejection of a passenger on the ground that fare tendered was not legal, an objection to a question to plaintiff as to where he got money to pay his fare after he was put off, should have been sustained.<sup>6</sup> In an action against a street railway company by a passenger for personal injuries received in alighting, plaintiff having testified on his own behalf in rebuttal, it was error to refuse to permit him on cross-examination to answer a question as to whether he knew that, if he got off the car while it was in motion, he could not recover in the action.<sup>7</sup> In an action against a street railroad company for personal injuries caused by the driver's suddenly starting the car while plaintiff was entering it, evidence that he started the car while she was attempting to alight therefrom is admissible as bearing upon his competency.<sup>8</sup> Evidence that it is a part of the duty of a street car driver to see that passengers put their fare in the box, and that in attending to such duty he is sometimes compelled to face the car, is admissible in an action for driving the street car over plaintiff, where it is

quitted. *Vadney v. Albany Ry.*, 47 App. Div. (N. Y.) 207, 62 N. Y. Supp. 140.

5. *Galveston, etc., R. Co. v. La Prella*, 27 Tex. Civ. App. 496, 65 S. W. 488.

**Evidence of an acquittal for an assault** has been held admissible in an action for wrongful ejection of a passenger which plaintiffs evidence tended to show was wanton and malicious. *Peterson v. Middlesex & Somerset Trac. Co.*, 71 N. J. L. 296, 3 St. Ry. Rep. 622, 59 Atl. 456.

6. *Mobile St. Ry. Co. v. Watters*, 135 Ala. 227, 33 So. 42. In an action against a railroad company for wrongfully ejecting a passenger, evidence of a fight which occurred between the conductor and plaintiff, and which was the result of the latter's attempt to get on the car, is admissible to show what injury plain-

tiff sustained from the continuance of the assault and throw light on the character of the transaction, the amount of force used, and the method adopted by the conductor in ejecting plaintiff. *Denver Tramway Co. v. Reed*, 4 Colo. App. 500, 36 Pac. 557.

7. *Grabenstein v. Met. St. Ry. Co.*, 84 N. Y. Supp. 261.

8. *Fuller v. Jamestown St. R. Co.*, 75 Hun (N. Y.) 273, 58 St. Rep. (N. Y.) 206, 26 N. Y. Supp. 1078. It is competent upon the question of negligence of a motorman in striking a passenger who was in the act of alighting from a car on an adjoining track, to prove a rule of the company requiring its motorman to keep their cars under full control when approaching another car under conditions similar to those shown in the case. *Atlanta Consol. R. Co. v. Bates*, 103 Ga. 333, 30 S. E. 41.

claimed that the driver might have seen him if he had looked, although it cannot be shown with certainty what was the precise situation at the time of the accident.<sup>9</sup> Where a passenger was injured by reason of a broken rail, evidence that witnesses had seen broken rails lying untouched in position was inadmissible to rebut defendant's testimony that his servants had passed over the track a short time before the wreck and discovered no broken rails, and that they would have noticed a broken rail had there been one.<sup>10</sup> In an action against a street railroad company for injuries to a passenger caused by another passenger being thrown upon her while the car was rounding a curve, the fact that the passenger who was so thrown upon plaintiff was talking to the conductor just before the accident was immaterial.<sup>11</sup> In an action for injuries caused by being thrown from the platform of a car forming part of an excursion train, where it was shown that plaintiff was forced to stand on the platform owing to the crowded condition

9. *McCoy v. Milwaukee St. R. Co.*, 88 Wis. 56, 59 N. W. 453.

10. *Whittlesey v. Burlington, etc., R. Co.*, (Iowa) 90 N. W. 516, and holding that evidence that witnesses had seen broken rails on other sections of the road is inadmissible. Evidence as to the condition of the brakes at different times before the accident on a street car which ran over plaintiff is admissible in connection with evidence that the brakes remained in the same condition down to the time of the accident. *Rockford City R. Co. v. Blake*, 173 Ill. 354, 50 N. E. 1070, 64 Am. St. Rep. 122; affg. 74 Ill. App. 175.

**In an action for an injury due to derailment** of a car, upon the question of whether the employees should have known that the wheels had left the track, it has been held competent to show by a witness accustomed to ride upon street and over the bridge upon which the accident

occurred, and who was familiar with the noise and motion which the cars ordinarily made in passing over the scene of the accident, that the noise and motion of the car as it approached and ran upon the bridge in question was usual or unusual. *Beers v. West Side R. Co.*, 101 App. Div. (N. Y.) 108, 3 St. Ry. Rep. 711, 91 N. Y. Supp. 957.

11. *Merrill v. Met. St. Ry. Co.*, 73 App. Div. (N. Y.) 401, 77 N. Y. Supp. 122, and where the complaint contained no allegations that the roadbed was out of order or improperly constructed, or that the car was not a proper one or not properly equipped, and there was no evidence that the conductor did not warn the passengers of the approach of the curve, the refusal to permit testimony of peculiar motions of the car in going around the curve at other times was not error.

of the interior of the car, evidence that defendant had advertised the excursion and expected large crowds was admissible.<sup>12</sup> In an action for injuries to a passenger from an electric shock received from a charged street car, evidence of another person that he was shocked by the same car on the same day was admissible as tending to show that the car and equipments were not in proper condition, and that the company knew, or ought to have known, such fact by the use of ordinary care.<sup>13</sup> And it was held competent for one who had been in the employ of defendant as a motorman for three years, and who had ridden on one of defendant's cars a short time before the accident in question, to testify as to the kind of couplers in use on defendant's railway, though he had not seen the one in use on the car in question when the

**12.** *Williams v. International & G. N. R. Co.*, 28 Tex. Civ. App. 503, 67 S. W. 1085.

**13.** *Dallas Consol. El. St. R. Co. v. Broadhurst*, 28 Tex. Civ. App. 630, 68 S. W. 315.

Evidence is admissible in an action against a street railway company by a passenger injured by catching her foot in a ring in the floor of the car, that the ring was standing erect immediately after the accident, and on being pushed down, would rise and remain upright on the starting of the car, as such evidence tends to show that the ring was in such condition and operated in such manner when the car left the barn, some time before, which would charge the company with notice of the defect, or show negligence on the part of the conductor in failing to discover its condition. *Kingman v. Lynn & B. R. Co.*, 181 Mass. 387, 64 N. E. 79.

**Breaking of trolley wire.** — In an action because of injuries to a passenger on a car by the breaking of a trolley wire, it was held proper to

prove, for the purpose of charging the company with notice of its unsafe condition, that the same wire had broken frequently during the same season. *Richmond Ry. & El. Co. v. Bowles*, 92 Va. 738, 6 Am. Electl. Cas. 449, 24 S. E. 388. In an action against a street railway for injuries sustained by the piling of snow on a crosswalk by defendant, it is not error to permit plaintiff to prove that others than herself had walked over the snow bank. *Newport News & O. P. Ry. & El. Co. v. Bradford*, 100 Va. 231, 4 Va. Sup. Ct. 219, 40 S. E. 900.

**In an action by a mother** against an electric street car company for the death of her son by being run over by another car while alighting from the car upon which he was a passenger, evidence that he never before had ridden upon an electric car is admissible at least for the purpose of illustrating the cause of his failure to alight in safety. *Augusta R. Co. v. Glover*, 92 Ga. 132, 18 S. E. 406, 58 Am. & Eng. R. Cas. 269.

accident took place.<sup>14</sup> Defendant's testimony showing how the equipment of an electric road compared with other roads, was properly excluded in an action against the carrier to recover for injuries caused by the derailment of a car, when offered to show that defendant's cars could run over the track at a certain speed with safety.<sup>15</sup> Where a passenger, in entering a crowded street car, is struck by a brake handle, which was whirled around by the brake becoming unfastened, it is proper to receive testimony that a witness, in a position to know, had never heard of a like accident, since a passenger carrier is not obliged to foresee and provide against casualties unknown and not reasonably to be expected, and his liability is not to be ascertained by what appears for the first time after disaster to be a proper precaution against its occurrence.<sup>16</sup> Evidence that a passenger injured while getting off a street car while in slow motion hesitated before starting to get off, and that she failed to take hold of the railings of the car is admissible in an action against the company on the issue of plaintiff's contributory negligence.<sup>17</sup> Notice to defendant in

**14.** *Birmingham Railway, L. & P. Co. v. Bynum*, 139 Ala. 389, 3 St. Ry. Rep. 6, 36 So. 736.

**15.** *Bosqui v. Sutro R. Co.*, 131 Cal. 390, 63 Pac. 682. Evidence that a good many people traveled at an intersection of streets where a collision between a locomotive on a street railroad and a mule and wagon occurred is admissible upon the question whether the rate of speed at which it was run, or the failure to give signals, constituted negligence. *Highland Ave. & B. R. Co. v. Simpson*, 112 Ala. 425, 20 So. 566. It is competent upon the question of the condition of appliances at the time of the accident to show their condition twenty minutes thereafter in the absence of proof of any alteration in the interval. *Woods v. Long Island R. Co.*, 11 App. Div. (N. Y.) 16, 42 N. Y. Supp. 140.

**16.** *Holt v. Southwest Mo. Elec. Ry. Co.*, 84 Mo. App. 443. Evidence as to the improper construction of a car step is not admissible under an allegation that the motorman negligently released the brake as plaintiff was attempting to board the car and thus caused her injury. *Hansberger v. Sedalia El. Ry. & P. Co.*, 82 Mo. App. 566. In an action against an electric street railway company by a passenger for personal injuries caused by being thrown from and under a car and coming in contact with electricity, testimony of another passenger that no other passengers getting on or off the car at the same time were injured by electricity is irrelevant. *Denver Tramway Co. v. Reid*, 4 Colo. App. 53, 35 Pac. 269.

**17.** *Root v. Des Moines City Ry. Co.*, 113 Iowa 675, 83 N. W. 904. Evidence that a street railway com-

an action for personal injuries, before the injury, of the nature of the dangers to be apprehended and of the unsafe practices it was employing, is competent upon the question of its negligence in the use of methods which it knew or ought to have known were hazardous to the lives of those necessarily exposed to danger.<sup>18</sup> Evidence of the habit of passengers on the road of a street car company, to give signal for stopping and starting cars, is admissible in an action for an injury to a passenger caused by the sudden starting of the car while she was alighting in response to a signal by one of the passengers.<sup>19</sup> Testimony of witnesses that an event did not take place, in opposition to that of others that

pany was accustomed to make very short stops at a street where a passenger desired to alight, not allowing sufficient time for the passengers to leave the car in safety, is admissible upon the question whether the passenger acted as a reasonably prudent man would under the circumstances, in leaving his seat while the car was in motion, and attempting to walk backwards upon the running-board preparatory to alighting. *Mt. Adams, etc., R. Co. v. Isaacs*, 18 Ohio C. C. 177. Evidence as to the habit or practice of a passenger injured by a car approaching on a parallel track as he was alighting from a street car, in departing from cars on other occasions either before or after the injury complained of, is not admissible as tending to show that he was guilty of contributory negligence upon the occasion in question in attempting to alight between the tracks. *Atlanta Consol. St. R. Co. v. Bates*, 10 Ga. 333, 30 S. E. 41. See also *McDonald v. Montgomery St. R. Co.*, 110 Ala. 161, 20 So. 317.

**The rules of a street railway company** as to the rate of speed in rounding curves are not admissible

against plaintiff in an action for personal injuries received in a collision between his truck and a car as it rounded a curve. *O'Keefe v. Eighth Ave. R. Co.*, 33 App. Div. (N. Y.) 324, 53 N. Y. Supp. 940. In an action for personal injuries, it is competent for the plaintiff to show that it was customary, at the crossing where he was injured, for people to board the street cars while in motion, as bearing on the question as to whether he was in the exercise of ordinary care for his personal safety. *South Chicago City Ry. Co. v. Dufresne*, 102 Ill. App. 493.

**18.** *Brady v. Manhattan R. Co.*, 127 N. Y. 46, 27 N. E. 368; *N. Y. El. Equip. Co. v. Blair*, (C. C. A., 2d C.) 51 U. S. App. 81, 79 Fed. 896, 25 C. C. A. 216. Evidence of defective condition of a car prior to date of an accident alleged to have been due to such defect is admissible for the purpose of showing knowledge of the condition of the car by the company operating it. *Denver Tramway Co. v. Crumbaugh*, 23 Colo. 363, 48 Pac. 503.

**19.** *Nichols v. Lynn & B. R. Co.*, 168 Mass. 528, 47 N. E. 427.

it did, cannot be regarded as negative testimony.<sup>20</sup> The admission in evidence of rules of the defendant company regulating the speed of its cars down hill and requiring stops at specified points is not error where they do not require a higher degree of care than is imposed by law and their effect is further properly limited by the instruction to the jury.<sup>21</sup>

§ 477. **Evidence in other actions — When admissible.** — Where in an action against a street railway company for injuries to a traveler at a crossing, defendant's witnesses testified to the rate of speed of the car, it was proper cross-examination to ask the witnesses to state the length of the run for the car, and the schedule time for such run.<sup>22</sup> In an action for negligently running against a person at a street crossing and failing to check the speed of the car, it was not error to receive testimony that the brake and controller of the car worked hard and were out of repair, when the court limited the effect of such evidence to the question of the manner in which the car should have been run when approaching the place of the accident.<sup>23</sup> In an action

**20.** *West Chicago St. R. Co. v. Mueller*, 165 Ill. 499, 46 N. E. 373; affg. 64 Ill. App. 601.

**21.** *Blumenthal v. Union Electric Co.*, 129 Iowa 322, 4 St. Ry. Rep. 303, 105 N. W. 588.

**22.** *Cook v. Los Angeles & P. Elec. Ry. Co.*, 134 Cal. 279, 66 Pac. 306. The testimony of a witness that he saw a car "coming down at a terrible speed" improper, as it conveys to the jury no measurement of the rate of speed, except as it conveyed to them the fact that it was at such a rate as the witness disapproved. *Chicago City Ry. Co. v. Wall*, 93 Ill. App. 411. Where, in an action for injuries for negligent management of a street car, defendant claimed that the car was going but eight miles an hour, and plaintiff had already shown that it

took eighty feet in which to stop it, plaintiff's evidence that but twelve feet would be required in which to stop a perfectly equipped car going eight miles an hour was admissible. *McDonald v. Brooklyn H. R. Co.*, 51 App. Div. (N. Y.) 186, 64 N. Y. Supp. 480.

**23.** *South Chicago City Ry. Co. v. Purvis*, 193 Ill. 454, 61 N. E. 1046. In an action for damages arising from a collision between an electric street car and a team, evidence that there was no conductor upon the car at the time of the accident is inadmissible in the absence of testimony that a conductor was requisite or necessary to the safe management and running of the car. *Christensen v. Union Trunk Line*, 6 Wash. 75, 32 Pac. 1018.

for injuries sustained by reason of a collision of plaintiff's wagon and a street car, where evidence of a failure to give warning of the approach of the car by ringing the bell is not available as a ground of liability, such failure may be shown as part of the *res gestæ*, as bearing on the exercise of care by the plaintiff in remaining on the track while the car was approaching.<sup>24</sup> Evidence of the witnesses as to the sounding of the gong by the driver of a fire vehicle is not inadmissible because the conditions surrounding such witnesses were not identical with those surrounding the motorman.<sup>25</sup> In an action for the death of the driver of a horse car, caused by the collision of a cable car therewith at the intersection of the streets on which they were running, it is competent to show within what distance cable cars moving at a certain rate of speed had previously been stopped, as bearing on the question of negligence in failing to stop the cable car before it came in contact with the horse car.<sup>26</sup> In an action for negligently causing the death of a child by collision at a street crossing, evidence as to the distance the car ran after the accident was admissible as bearing upon the general conduct and control of the train.<sup>27</sup> In an action against a street rail-

**24.** *Chicago Gen. Ry. Co. v. Kriz*, 94 Ill. App. 277. An allegation in a complaint against a street railway company for personal injuries sustained in a collision between one of the company's cars and plaintiff's wagon, that the company negligently ran the car at high speed and carelessly and negligently omitted to give any signal of its approach, is not an averment of general negligence so as to render evidence thereof admissible, but at most of negligence in running at a high rate of speed and in giving no signal. *Redford v. Spokane St. R. Co.*, 9 Wash. 55, 36 Pac. 1085.

**25.** *Hanlon v. Milwaukee Electric Ry. & Light Co.*, 1 St. Ry. Rep. 821, 118 Wis. 210, 95 N. W. 100.

**26.** *Chicago City R. Co. v. Mc-*

*Laughlin*, 146 Ill. 353, 34 N. E. 796. The fact that a street car runs an unusual distance before it is stopped, after running over a person, is some evidence of improper management thereof. *Chicago City Ry. Co. v. Tuohy*, 63 N. E. 997, 196 Ill. 410; affg. 95 Ill. App. 314. Evidence of the speed shortly before a collision of a street car in which a passenger is injured with another car, in which the front platform of the former strikes the center of the latter car, is admissible in an action by the passenger. *Wilson v. Broadway & S. A. R. Co.*, 8 Misc. Rep. (N. Y.) 450, 60 St. Rep. (N. Y.) 60, 28 N. Y. Supp. 781.

**27.** *Gray v. St. Paul City Ry. Co.*, 87 Minn. 280, 91 N. W. 1106. In an action against a street railway com-

way company for negligently killing a five-year-old boy who was crossing the track on a necessary errand upon which he was sent by his sick mother, evidence of her physical condition is admissible in connection with her act and instructions in sending him, on the question whether her sending him unattended across the track was negligent under the circumstances.<sup>28</sup> Evidence of omission to sound a street car gong at a place where the law did not require it to be sounded is admissible as a part of the history of the transaction, and as bearing upon the degree of care exercised by the street car employees, and upon the question of plaintiff's contributory negligence.<sup>29</sup> A neighbor of one injured who has seen plaintiff daily for some months before the accident may testify that prior to the accident she never heard the plaintiff complain as to her health.<sup>30</sup> Evidence that plaintiff in an action for personal injuries was a sober and industrious man is competent upon the question of damages.<sup>31</sup> Evidence that before an accident caused by the breaking of a wire cable used in controlling the movements of street cars on a steep incline the attention of a director of the company had been called to the weakened condition of the cable, and apparent defects pointed out to him, is admissible.<sup>32</sup> In an action for injuries to a motorman alleged to

pany for personal injuries from a collision with plaintiff's wagon, evidence that it was the custom in the city for wagons to keep to the right on a traveled street is admissible where defendant makes the issue that the plaintiff should have crossed the track to the left side of the street, instead of driving onto and along the tracks and around a broken down wagon, keeping on the right side. *Cincinnati St. R. Co. v. Whitecomb*, 66 Fed. 915, 1 Ohio Dec. (Fed.) 5.

**28.** *Citizens' St. R. Co. v. Stoddard*, 10 Ind. App. 278, 37 N. E. 723.

**29.** *Kleiner v. Third Ave. R. Co.*, 162 N. Y. 193, 56 N. E. 497; revg. 38 App. Div. (N. Y.) 633, 57 N. Y. Supp. 1140. Negligence of a street

car company in permitting its car to be overcrowded so that a passenger was injured in alighting by being pushed by another passenger is not within a declaration alleging careless driving and management of the car and its sudden starting while plaintiff was alighting. *Met. R. Co. v. Jones*, 21 Wash. L. Rep. 646, 1 App. D. C. 200.

**30.** *West Chicago St. R. Co. v. Kennelly*, 170 Ill. 508, 48 N. E. 996, 9 Am. & Eng. R. Cas. N. S. 359; affg. 66 Ill. App. 244.

**31.** *Met. St. R. Co. v. Kennedy*, (C. C. A., 2d C.) 51 U. S. App. 503, 82 Fed. 158.

**32.** *Musser v. Lancaster City St. R. Co.*, 176 Pa. St. 621, 39 W. N. C.

have been caused by losing control of his car because it was not equipped with automatic sand boxes, it was held competent to show other similar runaways for similar causes upon the same portion of the road, as this would be evidence of notice to the defendant that it should make all reasonable efforts to avoid a danger imperiling the lives and limbs of its employees and passengers.<sup>33</sup> Where an action was brought to recover for injuries sustained by glass falling from an electric lamp globe broken by a trolley pole attached to a street car, while such car was rounding a curve at the corner where such electric lamp was located, it was held to be error to refuse to admit evidence that similar accidents had occurred before, not only at the particular curve in question, but also on other curves on the line of the road, that is, that lamps had previously been so broken.<sup>34</sup> In an action for injuries in crossing a street railway track caused by the wheels of a vehicle striking a rail protruding above the surface of the street, evidence of the condition of the track at the point of the accident and other points is admissible.<sup>35</sup> Evidence of the competency of the engineer in charge of the engine which caused the injury is admissible in an action against an elevated railroad company for burning an awning by sparks from its engine.<sup>36</sup> In an action for injury to a boy, evidence that the conductor asked boys who were on their way from school to "come on and help push the car" was admissible as part of the *res gestæ* to show that the conductor had notice of the presence of the boys.<sup>37</sup> A particular habit or custom of a person may be properly shown,

37, 35 Atl. 206, 18 Lanc. L. Rev. 369. Evidence that notice was given to an electric company, prior to an accident from a fallen wire, that the wire was down, is admissible upon the issue of negligence in omitting to exercise due care in building the line and in failing to maintain it in good repair. Denver Consol. Elec. Co. v. Simpson, 21 Colo. 371, 31 L. R. A. 566, 41 Pac. 499.

33. Mayer v. Detroit, Y. A. A. &

J. Ry. Co., 142 Mich. 459, 4 St. Ry. Rep. 491, 105 N. W. 888.

34. Nelson v. Union R. Co., 26 R. I. 251, 3 St. Ry. Rep. 778, 58 Atl. 780.

35. Houston St. Ry. Co. v. Medlenka, (Tex.) 43 S. W. 1028.

36. Flynn v. Manhattan R. Co., 1 Misc. Rep. (N. Y.) 188, 48 St. Rep. (N. Y.) 670, 20 N. Y. Supp. 652.

37. Swanson v. Chicago City Ry. Co., 242 Ill. 388, 6 St. Ry. Rep. 451, 90 N. E. 210.

where the evidence is conflicting as to whether he has or has not done some act material to the issue to be tried.<sup>38</sup> In an action for injuries to a motorman who jumped from his car to avoid a collision with another car, photographs of the cars and surroundings taken the same evening of the accident were admissible to show the physical conditions at the time of the accident and to throw light on the rate of speed of the cars at the time.<sup>39</sup> In an action for the death of the captain of a hook and

**38.** *Denver Tramway Co. v. Owens*, 20 Colo. 107, 36 Pac. 848.

**Other cases in which the courts have ruled on the admissibility of evidence:** *Newport News & O. P. Ry. & Elec. v. Bradford* 99 Va. 117, 3 Va. Sup. Ct. Rep. 15, 37 S. E. 807, where the exclusion of evidence that plaintiff could have avoided crossing a street car track was held to be erroneous since such evidence had a bearing on plaintiff's contributory negligence in unnecessarily exposing herself to danger; *Price v. Charles Warner Co.*, 1 Penn. (Del.) 462, 42 Atl. 699, in an action for personal injuries to a motorman of the street car in collision with a wagon, he may testify that the car was run on schedule time, and that it was on time at the time of the accident, but evidence as to the length of time it takes a team of horses to draw a wagon, on a walk, from a specified place to a railroad track, is inadmissible to show the time taken by defendant's horses, and evidence as to the distance in which a street car could be stopped on a certain grade is inadmissible where the collision occurred while the wagon was descending another grade; *Morrow v. St. Paul City R. Co.*, 74 Minn. 480, 12 Am. & Eng. R. Cas. N. S. 836, 77 N. W. 303, evidence as to compe-

tency of gripman admissible; *Walsh v. Atlantic Ave. R. Co.*, 23 App. Div. (N. Y.) 19, 48 N. Y. Supp. 343; *Laufer v. Bridgeport Trac. Co.*, 68 Conn. 475, 37 Atl. 379, 2 Chic. L. Wkly. 287, evidence that the car was running very rapidly at other places on the same trip admissible to support a claim that at the time of the accident it was behind schedule time and trying to make up; *Straus v. Newburgh Elec. R. Co.*, 6 App. Div. (N. Y.) 264, 39 N. Y. Supp. 998, evidence of injuries to wagon and as to condition of a road at point of accident admissible to show speed at which car struck wagon; *Coyle v. Third Ave. R. Co.*, 18 Misc. Rep. (N. Y.) 9, 40 N. Y. Supp. 1131; revg. 17 Misc. Rep. (N. Y.) 282, 40 N. Y. Supp. 362, evidence that accident was due to negligent omission to stop a cable car or slacken its speed not admissible under a complaint alleging as the sole negligence the omission to give warning of the approach of the car, although such evidence would have been admissible under a general averment of negligence without a specification of the particular act of negligence.

**39.** *Edge v. Southwest Missouri Elec. Ry. Co.*, 206 Mo. 471, 6 St. Ry. Rep. 106, 104 S. W. 90.

ladder company, resulting from a collision of a truck with a street car, a rule of the street railway company requiring that the right of way be given to an engine or truck of the fire department, is admissible in evidence.<sup>40</sup>

§ 478. Evidence in other actions — When inadmissible. — In an action against a street railway company for personal injuries from a collision between a street car and a carriage in which the plaintiff was driving, evidence as to the competency or general character of the plaintiff's driver is inadmissible, where the issue is not whether a careless or unskillful driver was employed, but whether his negligence contributed to the accident.<sup>41</sup> In an action by a husband for injuries to his wife, evidence that on Sundays, at the hour at which the accident happened, but few people returned to the city by the defendant's cars, and there was no crowd, is inadmissible, as the term "few," as used and applied to Sunday travel on a street railroad, is indefinite.<sup>42</sup> In an ac-

**40.** Toledo Ry. & Light Co. v. Ward's Adm'r, 25 Ohio C. C. 399.

Rules of a street railway as to yielding a right of way to the fire department are admissible in evidence as bearing upon the care exercised by the defendant's employees but are not admissible as substantive grounds of recovery. Chicago City Ry. Co. v. McDonough, 221 Ill. 69, 4 St. Ry. Rep. 205, 77 N. E. 577.

**41.** Wooster v. Broadway & S. A. R. Co., 72 Hun (N. Y.) 197, 55 St. Rep. (N. Y.) 174, 25 N. Y. Supp. 378. Evidence that the motorman of an electric car, suing for personal injuries sustained by collision with defendant's wagon, was habitually careful, is inadmissible, where no attempt has been made to show that he was incompetent or careless. Price v. Charles Warner Co., 1 Penn. (Del.) 462, 42 Atl. 699. The habits of a motorman, as to the use of intoxicants prior to the day of the accident, are not admissible on the question of his negligence, but it is competent to show his condition as to the use of intoxicants on the day of the injury. Fitzpatrick v. Bloomington City R. Co., 73 Ill. App. 516.

**42.** Indianapolis St. Ry. Co. v. Robinson, 157 Ind. 414, 61 N. E. 936. Evidence that a street is thickly populated at a place where one was struck by a street car is relevant upon the question whether the driver exercised due care. Burnstein v. Cass Ave., etc., R. Co., 56 Mo. App. 45. The usual custom of pedestrians in undertaking to cross a street along which cars drawn by dummy engines are passing is incompetent upon the trial of an action against a street railway company by a husband for injuries to his wife, sustained by being struck by a dummy engine in endeavoring to cross a street in front

tion for injuries received by a bicycle rider in a collision with defendant's street car, it was error to allow defendant's witnesses to state how long it would take them to dismount on meeting an approaching team, as the inquiry should have been confined to what it would be reasonably practicable for the ordinary rider to do under the circumstances.<sup>43</sup> In an action against a street railroad for the death of plaintiff's intestate by a collision between his wagon and a street car where it was plaintiff's theory that the car was running at an excessive rate of speed, it was error to receive evidence as to the speed of six or seven cars at the place of the accident some six months after the accident where it did not appear that the conditions at the time of the observations were in any respect common with those existing at the time of the accident.<sup>44</sup> Where there is no evidence that a street car track was not constructed in the usual manner at the point where the accident occurred for which suit is brought, and that the same conditions existed, the exclusion of evidence of previous

of a train. *Metropolitan St. R. Co. v. Johnson*, 91 Ga. 466, 18 S. E. 816.

**43.** *Palmer v. Cedar Rapids & M. C. Ry. Co.*, 113 Iowa 442, 85 N. W. 756. In an action by a street railway employee for personal injuries caused by a crushing of his leg between a bank of rock and the side of a motor upon which he was being transported home and over the edge of which his leg was projecting, after he had been carried beyond a certain switch where he was to get off, evidence that such switch was a regular stopping place is competent as showing that he had a right to expect that he would have an opportunity to get off, especially if he signaled the motorman for that purpose. *Denver & B. P. Rapid T. Co. v. Dwyer*, 36 Pac. (Colo.) 1106; revg. 3 Colo. App. 408, 33 Pac. 815.

**44.** *Hewlett v. Brooklyn H. R. Co.*,

63 App. Div. (N. Y.) 423, 71 N. Y. Supp. 531. In an action for damages for a personal injury received by plaintiff by reason of his horse becoming frightened at defendant's street cars, which were negligently allowed to stand on a bridge on a public highway, evidence that other horses had been frightened at defendant's cars standing at the same place where plaintiff's horse took fright is competent. *San Antonio Edison Co. v. Beyer*, (Tex. Civ. App.) 57 S. W. 851; *Cunningham v. Met. St. Ry. Co.*, 29 Misc. Rep. (N. Y.) 123, 60 N. Y. Supp. 277, it is reversible error to exclude evidence of the circumstances of an accident to a person injured at the same place as the accident in question, and about the same time as plaintiff claimed to have been injured, after having corrected her statement of the time twice, under

accidents at the same place was proper.<sup>45</sup> Where plaintiff, who was standing on the sidewalk, was injured by reason of a collision between defendant's cable car and a wagon, evidence that the driver of the wagon was guilty of contributory negligence was immaterial.<sup>46</sup> In an action for death caused by a street car, a witness cannot be asked where the conductor was after the car stopped, and while the deceased was under it, as the conductor's acts after the accident cannot affect the question of careless running at the time of the accident.<sup>47</sup> Evidence of a rule of a street

oath. See also *Atlanta Consol. St. Ry. Co. v. Foster*, 108 Ga. 223, 33 S. E. 886.

**45.** *Morrow v. Westchester Elec. Ry. Co.*, 54 App. Div. (N. Y.) 592, 67 N. Y. Supp. 21; affg. 63 N. Y. Supp. 16. Evidence that boys had ridden on defendant's cars at different times, without permission, and at other times by invitation, and without paying fare, is incompetent as not tending to prove that plaintiff, a boy ten years of age, was entitled to ride on the car he attempted to board at the time he was injured. *Little Rock Trac. & E. Co. v. Nelson*, 66 Ark. 494, 52 S. W. 7.

**Evidence of the existence of a defect** in the roadbed of a street railroad company for some time prior to an accident is admissible as tending to establish negligence in its failure to repair. *Cunningham v. Fair Haven & W. R. Co.*, 72 Conn. 244, 6 Am. Neg. Rep. 427, 43 Atl. 1047. But evidence of the bad condition of a street railway crossing several hundred feet each side of the place where plaintiff was injured is inadmissible to show that defendant has had an opportunity to know of the defective condition of the road. *Houston City St. R. Co. v. Medlenka*, 17 Tex. Civ. App. 621, 43 S. W. 1028.

**46.** *Knoll v. Third Ave. R. Co.*, 168 N. Y. 592, 60 N. E. 1113; affg. 46 App. Div. (N. Y.) 527, 62 N. Y. Supp. 16. In an action for personal injuries caused by a street car's colliding with plaintiff and his horse and wagon, and going in the same direction, evidence of the capacity of the horse for speed was inadmissible, as it did not tend to show the rate of speed at which the car or horse was going at the time of the injury. *Spargo v. West End St. Ry. Co.*, 175 Mass. 174, 55 N. E. 812. Evidence that the driver of street car, claimed to have ran into plaintiff's wagon, was arrested therefor, is inadmissible. *Seipp v. Dry Dock, E. B. & B. R. Co.*, 45 App. Div. (N. Y.) 489, 61 N. Y. Supp. 409.

**Death of a horse.**—In an action against an electric street railway company for the death of a horse killed by the knocking upon him by a trolley pole of a telephone wire which touched the railway wire and completed the circuit, evidence that the telephone wire was negligently left in its position by the telephone company or the city is not competent as it is foreign to the question of defendant's negligence. *Kankakee Elec. R. Co. v. Whittemore*, 45 Ill. App. 484.

**47.** *Wilcox v. Wilmington City*

railway company which requires a higher degree of care on the part of a motorman than the law imposes on the company itself is inadmissible in evidence, where the injured party neither knew nor relied upon the existence of the rule.<sup>48</sup> Evidence that a motorman on other similar occasions has been careful is not admissible on the question as to his care on the occasion in question; <sup>49</sup> and evidence that one traveling on the street was careful on other occasions to look for cars before crossing a track is not admissible.<sup>50</sup> Evidence as to the extent of the vertical and lateral oscillation of an electric car, at the same point, and about a month after an accident claimed to have been caused by such oscillations, is inadmissible for the purpose of showing the extent of the oscillations at the time of the accident, where it does not appear that the conditions were similar.<sup>51</sup> Evidence that a child *non sui juris* was allowed to play on the streets alone is inadmissible in an action for personal injuries received in the streets at

Ry. Co., 2 Penn. (Del.) 157, 44 Atl. 686. In an action for injuries to a child of six years jumping upon the footboard of a street car, evidence that threatening gestures and language were used by the conductor to the boy, and that he was frightened thereby and caused to fall from the car is admissible under allegations that the defendant attempted to eject him from the car without stopping it, and by its negligence, carelessness, and default in ejecting him without precaution that he should be removed in a safe manner and to a safe place, he was pushed and shoved off the car in such manner as to cause him to fall under the wheels. *Mt. Adams, etc., R. Co. v. Doherty*, 8 Ohio C. C. 349.

48. *Isaackson v. Duluth St. R. Co.*, 75 Minn. 27, 5 Am. Neg. Rep. 178, 77 N. W. 433. Evidence that a street railway company contracted for cars to run twenty miles an hour is inad-

missible in an action against the company for negligently injuring a person by a car alleged to be running thirty miles an hour. *Orr v. Cedar Rapids, etc., R. Co.*, 62 N. W. (Iowa) 851.

49. *Sunderland v. Pioneer Fire Proof Const. Co.*, 78 Ill. App. 102.

50. *Gulf C. & S. F. R. v. Hamilton*, 17 Tex. Civ. App. 76, 42 S. W. 358; *Eaton v. Boston & Maine R. Co.*, 67 N. H. 422, 40 Atl. 112.

51. *Schmidt v. Coney Island & B. R. Co.*, 26 App. Div. (N. Y.) 391, 49 N. Y. Supp. 777, distinguishing *Cohn v. N. Y. Cent. & H. R. R. Co.*, 6 App. Div. (N. Y.) 196. In an action for the death of a passenger on a street car, caused by an alleged defect in the car track, evidence of the condition of the track sometime after the accident is competent in connection with evidence that the condition then was substantially the same as at the same time of the accident. *Byrne v.*

a time where the parents had taken care to prevent her from getting upon the street.<sup>52</sup> Evidence as to the custom of electric roads with reference to the number of men employed to operate a car under conditions similar to those shown in the case at bar is inadmissible upon the question of the negligence of the company in employing but one man to operate the car.<sup>53</sup> Rules of a fire department issued only to members thereof and not for the purpose of advising the public what the conduct of firemen would be under any particular emergency are not admissible in evidence in an action for the death of a fireman caused by a collision with a street car and a hose wagon.<sup>54</sup>

**§ 479. Actions for injuries to passengers — Sufficiency of evidence generally.** — In an action to recover damages for personal injuries against a street railroad company the plaintiff must sustain his case by a preponderance of evidence.<sup>55</sup> Negligence may

Brooklyn City, etc., R. Co., 6 Misc. Rep. (N. Y.) 260, 58 St. Rep. (N. Y.) 127, 26 N. Y. Supp. 760.

**52.** *Woekner v. Erie Electric Motor Co.*, 182 Pa. St. 182, 37 Atl. 936. In an action by a father for injuries to a minor child, evidence that plaintiff was in the habit of permitting his child to go upon the streets without any one in charge of him is inadmissible. *Lawrence v. Scranton Trac. Co.*, (C. P.) 2 Lack. Leg. News (Pa.) 101.

**53.** *Redfield v. Oakland Consol. St. R. Co.*, 112 Cal. 220, 43 Pac. 1117. Evidence of a custom to have a conductor on each car is inadmissible to show negligence of a street car company as to an accident after the conductor had stopped off, where an ordinance requiring the company to employ careful conductors and drivers to take charge of their cars while on the road is not pleaded, as in the absence of such ordinance no such

duty rests upon the company. *Gardner v. Detroit St. R. Co.*, 99 Mich. 182, 58 N. W. 49.

**54.** *McBride v. Des Moines City Ry. Co.*, 134 Iowa 398, 109 N. W. 618.

**55.** *Norfolk & W. Ry. Co. v. Poole's Admr.*, 4 Va. Sup. Ct. Rep. 42, 40 S. E. 627; *Norton v. Third Ave. R. Co.*, 26 App. Div. (N. Y.) 60, 49 N. Y. Supp. 898, but the jury is not required to find for the defendant, although the witnesses testifying in his behalf outnumber those testifying for the plaintiff; *Terre Haute Elec. R. Co. v. Lauer*, 21 Ind. App. 466, 5 Am. Neg. Rep. 581, 52 N. E. 703, 1 Rep. 576, it is sufficient to prove the substance of the issue; *North Chic. St. R. Co. v. Anderson*, 176 Ill. 635, 52 N. E. 21; affg. 70 Ill. App. 336, preponderance not necessarily determined by greater number of witnesses; *McCoy v. Milwaukee St. R. Co.*, 82 Wis. 215, 52 N. W. 93, although the weight of testimony does

be established, not only by a determination of disputed facts, but by inferences to be drawn from established facts, and the question is for the jury, whether their determination rests upon established facts or upon inferences which those facts warrant, if there is more than one inference to be drawn.<sup>56</sup> Where there are two or more possible causes of an injury, for one or more of which the defendant is responsible, the plaintiff, in order to recover, must show by evidence that the injury was wholly or partly the result of that cause which would render the defendant liable. If the evidence in the case leaves it just as probable that the injury was the result of one cause as of the other, the plaintiff cannot recover.<sup>57</sup> The mere fact that witnesses testify opposite to each other does not require the jury to find that such point is not proven; but they have the right to consider all the surrounding

not necessarily depend upon the number of witnesses, it may be increased by the number where the witnesses are of equal credibility, the weight and credibility being for the jury.

**56.** *Washington & G. R. Co. v. Grant*, 11 App. D. C. 107, 25 Wash. L. Rep. 342, it may be inferred from circumstantial proof; *Egan v. Dry Dock, etc., R. Co.*, 12 App. Div. (N. Y.) 556, 42 N. Y. Supp. 188. But a jury will not be allowed to render a verdict establishing the negligence of defendant upon a conjecture built upon a bare possibility, but the facts must exist which tend to show the existence of the negligence charged. *Pauley v. Steam Gauge & L. Co.*, 131 N. Y. 90, 29 N. E. 999. There must be evidence that the injury resulted from the negligence charged, and the causation cannot be left to the mere conjecture of the jury. *Omaha St. R. Co. v. Leigh*, 49 Neb. 782, 69 N. W. 111; *Kirby v. Delaware & H. Canal Co.*, 20 App. Div. (N. Y.) 473, 46 N. Y. Supp. 777. Negligence on the part of a street railway company may

be inferred from its carrying passengers greatly in excess of the seating capacity of its trains, and permitting them to stand on the platform and steps of the cars. *Pray v. Omaha St. R. Co.*, 44 Neb. 167, 62 N. W. 447. Negligence requires affirmative proof, but this is made when facts and circumstances are shown from which it can be inferred. *Wachtel v. East St. Louis & St. L. El. R. Co.*, 77 Ill. App. 465.

**57.** *Searles v. Manhattan R. Co.*, 101 N. Y. 661, 5 N. E. 2, 66; revg. 49 N. Y. Super. Ct. 425; *Taylor v. City of Yonkers*, 105 N. Y. 202, 209, 11 N. E. 642, 59 Am. Rep. 492; *Laidlaw v. Sage*, 158 N. Y. 101, 52 N. E. 679; *Priest v. Nichols*, 116 Mass. 401; *Smith v. First Nat. Bank*, 99 Mass. 605; *Marble v. Worcester*, 4 Gray (Mass.) 395; *Epperson v. Postal Tel. Cable Co., (Mo.)* 50 S. W. 795; *Reidy v. Met. St. Ry. Co.*, 27 Misc. Rep. (N. Y.) 527, 58 N. Y. Supp. 326; *Hanrahan v. Brooklyn Elev. R. Co.*, 17 App. Div. (N. Y.) 588, 45 N. Y. Supp. 474.

circumstances tending to corroborate the one or the other.<sup>58</sup> Where plaintiff testifies clearly as to defendant's negligence, and defendant's employee, while denying the facts affirmed by plaintiff, testifies to circumstances not inconsistent with plaintiff's account, and defendant's other witnesses are contradictory and uncertain in their statements a verdict for plaintiff should not be set aside as against the weight of evidence.<sup>59</sup> The burden of proving negligence causing an injury, in a case in which there is no special absolute duty which is not reciprocal, imposed by law or by contract upon the doer, in relation to the causal act or omission, but where the rights and duties of both parties are co-ordinate and complementary, is not discharged without proof of the failure of the defendant to exercise that degree of care which the law requires.<sup>60</sup> Where the evidence is equally consistent with the

**58.** *West Chicago St. R. Co. v. Lieserowitz*, 197 Ill. 607, 64 N. E. 718. Where plaintiff, who was corroborated by two others, testified that just as she was stepping from the car, it started with a jerk, and threw her down, and the conductor, motor-man, and three others testified that she alighted while the car was in motion, but some of the latter witnesses did not see all the transactions, verdict for plaintiff was held not against the evidence. *Nash v. Yonkers R. Co.*, 63 App. Div. (N. Y.) 315, 71 N. Y. Supp. 594. Plaintiff's evidence was that, after a signal was given to start a train, his decedent attempted to board one of the cars, but that the conductor shut the gate, imprisoning decedent's hand, so that, in spite of his cries to the conductor to "let go," he was dragged fifteen or twenty feet, and crushed against a bridge railing. Defendant's evidence was that decedent held on, though told by the conductor to "let go." Defendant furnished many witnesses but they were not in accord,

while the condition of the decedent's hand corroborated plaintiff's evidence. *Held*, that a verdict for plaintiff would not be disturbed. *Ericius v. Brooklyn H. R. Co.*, 71 N. Y. Supp. 596, 63 App. Div. (N. Y.) 353. Where plaintiff and defendant's conductor testified directly opposite to each other as to the principal facts, and a third person corroborated the conductor as to the speed of the car, but he had made contradictory statements out of court, and also testified as plaintiff had, that plaintiff alighted before the speed was increased, a judgment for plaintiff was sustained. *Root v. Des Moines City Ry. Co.*, 113 Iowa 675, 83 N. W. 904.

**59.** *West Chicago St. R. Co. v. Byrne*, 85 Ill. App. 488; *Spencer v. Ry. Co.*, 105 Wis. 311, 81 N. W. 407.

**60.** *Millie v. Manhattan R. Co.*, 5 Misc. Rep. (N. Y.) 301, 25 N. Y. Supp. 753, the mere fact that the rubber covering on the stairs of defendant's elevated railway station was out of repair and caused plaintiff to fall, without any evidence that the

absence as with the existence of negligence plaintiff cannot recover.<sup>61</sup> A court will not exercise the right which it has to supervise the verdict of a jury and set it aside as against the weight of evidence unless there is a plain preponderance of evidence to justify such action.<sup>62</sup> Evidence properly admitted for one pur-

defective condition of the stairs existed before the accident, is not sufficient to charge defendant with want of ordinary care in respect to the stairs, and, therefore, the maxim *res ipsa loquitur* does not apply; *Cleveland, C. & St. L. R. Co. v. Berry*, 152 Ind. 607, 53 N. E. 415, 46 L. R. A. 33, 6 Am. Neg. Rep. 45, 1 Rep. 875; *Schultz v. Chicago & N. W. R. Co.*, 67 Wis. 616, 31 N. W. 321; *McGowan v. Chicago & N. W. R. Co.*, 91 Wis. 147, 64 N. W. 891; *Case v. Chicago, R. I. & P. R. Co.*, 64 Iowa 762, 21 N. W. 30; *Quincy Min. Co. v. Kitts*, 42 Mich. 34, 3 N. W. 240; *Cosulich v. Standard Oil Co.*, 122 N. Y. 118, 25 N. E. 259; *Pierce v. Davis*, 53 U. S. App. 291; *Pierce v. Kile*, 80 Fed. 865, 26 C. C. A. 201.

**61.** *Cahn v. Manhattan Ry. Co.*, 37 Misc. Rep. (N. Y.) 824, 76 N. Y. Supp. 893, where plaintiff, a passenger, while leaving defendant's car, stepped on a nail, which penetrated his shoe and entered one of his toes, remaining there, and there was no direct proof that the nail came out of the floor of the car, but defendant proved that the car had been inspected an hour before the accident, and that a matting covered the floor. A complaint in an action for injury resulting from alleged negligence of defendant's servant is properly dismissed where the evidence is as consistent with due care as with lack of it. *McKelvey v. Twenty-Third St. R. Co.*, 5 Misc. Rep. (N. Y.) 424, 26 N. Y. Supp. 711.

**62.** *Pohle v. Second Ave. R. Co.*, 161 N. Y. 666, 57 N. E. 1122; affg. 13 App. Div. (N. Y.) 393, 42 N. Y. Supp. 1082, so held in a close case where the issue was whether defendant's street car was in motion when plaintiff attempted to board it, and plaintiff testified that it was not, and his testimony was contradicted by that of the conductor and a passenger, and by a statement signed by plaintiff, made to a person employed by defendant to prepare the defense in accident cases, who testified that he wrote the statement at plaintiff's dictation, and read it to him before he signed it, plaintiff testifying that he did not know what was put in the statement.

**In an action against a street railroad company** for personal injuries evidence by the plaintiff that on entering the car she told the conductor she wished to alight at a designated street, to which he assented; that when the car reached the crossing of such street she rang the bell; that the gripman applied the brake and brought the car almost to a standstill; and, thinking it would stop every instant, she stepped onto the platform running along the side, without using the handhold at the end of the seat, preparatory to stepping off when the car came to a full stop; and that while in such position, the gripman, although he saw her, released the brake and suddenly accelerated the speed of the car, throwing her on the street, and causing

pose is in the case of any other purpose it may legitimately serve.<sup>63</sup>

**§ 480. Actions for injuries to passengers — Sufficiency of evidence — Instances.** — Where the trolley of a disabled car, which was being pushed by another car, jumped its wire, striking and breaking a cross wire, thus causing the accident to plaintiff, the question of negligence is for the jury, on testimony that the proper course was to tie down the trolley of the disabled car, and that the conductor thereof was told by the conductor of the other so to do, but refused or neglected to do it.<sup>64</sup> The fact of a collision by a street car with an approaching hook and ladder wagon is sufficient proof of negligence to entitle a passenger free from negligence to recover for injuries caused thereby, in the absence of evidence to the contrary.<sup>65</sup> Negligence of a carrier is not shown by testimony of a passenger that as he went to get off the car his foot caught in the step, and that he pulled to get it loose, and when he did get it loose he fell.<sup>66</sup> Where plaintiff was injured by being ejected from a street car, and two or three witnesses testified that, at the time, in their opinion, the car was moving from five to ten miles per hour, and there was also evidence that the car moved twenty to twenty-five feet, after the plaintiff was put off, it was held sufficient to sustain the finding that at the time of the ejection of the plaintiff the car was mov-

the injury complained of, is sufficient to sustain a verdict in her favor, although two witnesses swear that there was no acceleration of the speed of the car, and three others testify that they did not observe any. *Omaha St. R. Co. v. Craig*, 39 Neb. 601, 58 N. W. 209.

**63.** *Hughes v. Met. Elev. R. Co.*, 130 N. Y. 14, 40 St. Rep. (N. Y.) 587, 28 N. E. 765.

**64.** *Schenkel v. Pittsburgh & B. Trac. Co.*, 194 Pa. St. 182, 44 Atl. 1072. And see *Moore v. R. Co.*, 119 Mich. 613, 78 N. W. 666; *Sweeney v. Ry. Co.*, 150 Mo. 385, 51 S. W. 682; *Pierce v. Ry. Co.*, 22 Mont. 445, 36

*Pac.* 867; *Houston, etc., R. Co. v. Stewart*, 21 Tex. Civ. App. 33, 50 S. W. 580; *Gannon v. R. Co.*, 173 Mass. 40, 52 N. E. 1075; *Harriman v. Ry. Co.*, 173 Mass. 28, 53 N. E. 156; *Bartley v. Ry. Co.*, 148 Mo. 124, 49 S. W. 840; *Houston, etc., R. Co. v. Richards*, 20 Tex. Civ. App. 203, 49 S. W. 687; *Ward v. R. Co.*, 102 Wis. 215, 78 N. W. 442.

**65.** *Olsen v. Citizens' Ry. Co.*, 152 Mo. 426, 54 S. W. 470; *Clark v. R. Co.*, 127 Mo. 210, 29 S. W. 1016; *Hill v. R. Co.*, 109 N. Y. 239, 16 N. E. 61.

**66.** *Howell v. Union Traction Co.*, 202 Pa. St. 338, 51 Atl. 885.

ing from three to four miles per hour.<sup>67</sup> In an action for personal injuries caused by falling under a street car, a finding that the car came to a full stop before the plaintiff attempted to alight is against the weight of evidence, where the plaintiff's testimony to that effect is corroborated by one witness whose account is contradictory, and is denied by several disinterested witnesses, and evidence is introduced of the plaintiff's admissions that he jumped from the car without asking the driver to stop.<sup>68</sup> The mere fact that a newsboy was injured by a street car leaving the track while he was on board selling papers in violation of a rule of the company is not sufficient to show negligence on the part of the company, if there is nothing to show that either the conductor or driver knew of his presence, or that either was recklessly or wantonly negligent as to his safety.<sup>69</sup> The failure of a street railway company to discover a defective welding in an iron on a canal bridge belonging to the State, which the street railway company was obliged to cross, is not evidence of negligence sufficient to go to the jury, where there was nothing to suggest to the general traveler or to the company the presence of any such defect, and it was not discoverable by one using the bridge merely for the purpose of crossing.<sup>70</sup> Evidence in an action for injuries by being driven upon and injured by a street car while stepping from

**67.** *Hirte v. Eastern Wisconsin Ry. & L. Co.*, 127 Wis. 230, 4 St. Ry. Rep. 1072, 106 N. W. 1068.

**68.** *Bernstein v. Dry Dock, etc.*, R. Co., 72 Hun (N. Y.) 46, 55 St. Rep. (N. Y.) 341, 25 N. Y. Supp. 669, the testimony of plaintiff, who attempted to board the front step of a moving trolley car while his left hand was incumbered with a bundle, that the car started quickly, based upon the fact that he felt a jerk as soon as he got on the step, is insufficient to show negligence of the motorman, where witnesses for the defendant testify that the instant plaintiff mounted the step the motorman

turned on the brake, which would necessarily produce a jerk, and the evidence tends to show that the plaintiff's fall was caused by the fact that he did not use his left hand; *Paulson v. Brooklyn City R. Co.*, 13 Misc. Rep. (N. Y.) 387, 68 St. Rep. (N. Y.) 123, 34 N. Y. Supp. 244. See also *Harris v. Second Ave. R. Co.*, 48 App. Div. (N. Y.) 118, 62 N. Y. Supp. 562; *Heusner v. Houston, etc.*, R. Co., 7 Misc. Rep. (N. Y.) 48, 57 St. Rep. (N. Y.) 527, 27 N. Y. Supp. 365.

**69.** *North Chicago St. R. Co. v. Thurston*, 43 Ill. App. 587.

**70.** *Birmingham v. Rochester City*

a car into a transfer car, from which the jury can find that the plaintiff immediately stepped to the transfer car and was attempting to enter it without using unnecessary time, and that he was driven upon within a few seconds, without being given an opportunity to enter or to see that he could not, and was not directed to do otherwise than to enter it, and that the rules required his making the transfer through the transfer car, and that the car by which he was injured was an open car, from which the driver could see that persons were on the track attempting to enter the transfer car with their backs toward him, is sufficient evidence to sustain a verdict for plaintiff.<sup>71</sup> Evidence that a motor car rounded a curve at a high rate of speed is insufficient to show negligence on the part of the company, where the car was not derailed, unless there is evidence that the rate of speed was unusual, improper, or dangerous.<sup>72</sup> An allegation of negligence of a street car company in respect to the speed at which a car was run cannot be established without testimony showing the standard of speed, and further testimony showing the breach of that standard; and a finding of excessive speed cannot be established upon the testimony of witnesses, not professing to know how fast cars ordinarily run, that the car was running fast.<sup>73</sup> A weak case for the plaintiff is made strong when a witness who could contradict it is not called by the defendant; and a party seeking a new trial on the ground that the verdict is against the weight of evidence must satisfy the court that he has called or explained the absence of any witness who could contradict the testimony of the opposing party, when the fact in question would be peculiarly within the knowledge of such witness.<sup>74</sup> An unex-

& B. R. Co., 137 N. Y. 13, 7 Am. R. & Corp. Rep. 513, 18 L. R. A. 764, 49 St. Rep. (N. Y.) 888, 33 N. E. 995.

**71.** *Citizens' St. R. Co. v. Merl*, 134 Ind. 609, 33 N. E. 1014.

**72.** *Francisco v. Troy & L. R. Co.*, 78 Hun (N. Y.) 13, 60 St. Rep. (N. Y.) 797, 29 N. Y. Supp. 247. But negligence is shown by evidence that a crowded car was permitted to strike

a short curve at a high rate of speed, without warning, whereby the car lurched and a passenger was thrown from the rear platform. *Schaefer v. Union R. Co.*, 29 App. Div. (N. Y.) 261, 51 N. Y. Supp. 431.

**73.** *Yingst v. Lebanon, etc., St. R. Co.*, 167 Pa. St. 438, 36 W. N. C. 320, 31 Atl. 687.

**74.** *Byrne v. Brooklyn City & N.*

plained statement in a letter directed to defendant, that plaintiff was thrown from "one of your cars," is sufficient to sustain a finding that plaintiff was a passenger on one of defendant's cars when injured.<sup>75</sup> Proof that a threaded bolt upon the platform of a street car extended three-eighths inches above the tap is sufficient to authorize a finding of negligence upon the part of the railroad company.<sup>76</sup> Evidence that a rapidly moving street car proceeded sixty-five or more feet after the request of plaintiff to the driver to stop the car before he jumped from the car, is not inconsistent with plaintiff's testimony that he actually jumped from the car to escape immediate injury threatened by the driver's motion.<sup>77</sup> That a boy eleven years old employed by a street car driver to drive the horse in drawing the car back to a switch was jostled off the rear platform of the car by boys escaping from the car at the order of the driver does not tend to prove that the platform was unsafe, or that there was negligence in placing him upon it to drive the car.<sup>78</sup> A finding that plaintiff was thrown off an open electric car while facing the motorman, by a violent and unnatural movement of the car, without negligence on his part, is not sustained by evidence that the car gave a "violent jerk" or "sudden plunge forward" after passing a crossing.<sup>79</sup> The burden of proving incompetency of an engineer is not discharged by evidence that in an emergency demanding prompt action and admitting of but a second or two of time for reflection, he did an act of doubtful propriety, but as to the propriety of which experts disagree. The quality of an act as careful or negligent is to be determined in the light of facts as they appeared to the actor at the time, and not in the light of facts then unknown and since discovered, unless it appears that but for his negligence or incompe-

R. Co., 6 Misc. Rep. (N. Y.) 260, 58 St. Rep. (N. Y.) 127, 26 N. Y. Supp. 760.

**75.** *Demann v. Eighth Ave. R. Co.*, 10 Misc. Rep. (N. Y.) 191, 62 St. Rep. (N. Y.) 476, 30 N. Y. Supp. 926.

**76.** *Chartrand v. Southern R. Co.*, 57 Mo. App. 425.

**77.** *Baber v. Broadway, etc., R. Co.*, 13 Misc. Rep. (N. Y.) 169, 68 St. Rep. (N. Y.) 95, 34 N. Y. Supp. 110.

**78.** *Marks v. Rochester R. Co.*, 146 N. Y. 181, 66 St. Rep. (N. Y.) 233, 40 N. E. 782.

**79.** *Brennan v. Brooklyn H. R.*

tency he would have known them.<sup>80</sup> A jury is justified in inferring that the starting of an electric car with such great violence as to throw to the floor passengers standing in the car was the result of improper application of the power to move the car, from the testimony of the motorman that the proper way is to put on the power one point at a time, and that if it is put on faster than that, it is apt to throw people down and injure them.<sup>81</sup> Other cases in which the courts have passed upon the question of the sufficiency of evidence are cited in note below.<sup>82</sup>

Co., 12 Misc. Rep. (N. Y.) 570, 67 St. Rep. (N. Y.) 605, 33 N. Y. Supp. 852.

**80.** *Piehl v. Albany R. Co.*, 19 App. Div. (N. Y.) 471, 46 N. Y. Supp. 257; *Wynn v. Central Park, etc., R. Co.*, 133 N. Y. 575, 30 N. E. 721; *Chrystal v. Troy & B. R. Co.*, 105 N. Y. 171, 11 N. E. 380.

**81.** *Grotsch v. Steinway R. Co.*, 19 App. Div. (N. Y.) 130, 45 N. Y. Supp. 1075.

**82.** *United Rys. & Elec. Co. v. Beidelman*, 95 Md. 480, 52 Atl. 913, as to effect of plaintiff's contradictory statements; *O'Neil v. Lynn & B. R. Co.*, 180 Mass. 576, 62 N. E. 983, proof not sufficient to justify finding that the negligence of any employee of defendant caused the car to start while plaintiff was stepping off; *Herbert v. St. Paul City Ry. Co.*, 85 Minn. 341, 88 N. W. 996, evidence held to sufficiently support verdict for plaintiff injured while alighting by slipping and falling on snow and ice negligently permitted to remain on steps and platform; *Bruce v. Brooklyn H. R. Co.*, 68 App. Div. (N. Y.) 242, 74 N. Y. Supp. 324, where a passenger went out on the front platform and fell off as the car was rounding a curve, evidence held insufficient to sustain a verdict based

on negligence of defendant; *Richmond Ry. & Elec. Co. v. West*, 4 Va. Sup. Ct. Rep. 112, 40 S. E. 643, allegation that defendant negligently permitted step to remain covered with ice not sustained by the proofs; *Gretzner v. New Orleans & C. R. Co.*, 105 La. 266, 29 So. 496, as the preponderance of the evidence was that the car did not move, there was a want of testimony to sustain the allegation of the complaint that plaintiff was thrown from the car by a sudden forward movement of the car while alighting; *Ludeman v. Third Ave. R. Co.*, 72 App. Div. (N. Y.) 26, 76 N. Y. Supp. 128, where the evidence was conflicting as to whether the car started suddenly while plaintiff was getting off or plaintiff attempted to get off while it was in motion, a verdict for plaintiff was not disturbed; *Citizens' St. Ry. Co. v. Stockdell*, 159 Ind. 25, 62 N. E. 21, evidence insufficient as to existence of defendant's corporation or ownership of the road; *Ehrhard v. Met. St. Ry. Co.*, 58 App. Div. (N. Y.) 613, 68 N. Y. Supp. 457, verdict for plaintiff's intestate held not justified by the evidence, where the only evidence of negligence was that of a witness, who was at a window 100 feet away, that the car came to a sudden jerk back which threw de-

§ 481. Evidence in other actions — When sufficient. — To entitle plaintiff to recover for injuries caused by being run over by a street car, some negligence must be shown on the part of the de-

ceased off on her head, and then went on, and that after the fall the danger signal was rung, and the car then stopped suddenly, and the conductor, motorman, several passengers and a bicycle policeman all testified that there was no sudden jerk or check of the car until the ringing of the danger signal after the accident; *Foster v. Old Colony St. Ry. Co.*, 182 Mass. 378, 65 N. E. 795, evidence of negligent injury of plaintiff while alighting because of slippery condition of steps of the car occasioned by a storm, held sufficient; *Muller v. Met. St. Ry. Co.*, 78 N. Y. Supp. 1069, passenger while alighting thrown to ground by sudden starting of car, verdict in favor of plaintiff held not against preponderance of evidence; *International & G. N. R. Co. v. Phillips*, (Tex. Civ. App.) 69 S. W. 107, evidence sufficient to sustain verdict of negligence for injury to passenger by the window of a car falling on his fingers; *Miller v. St. Paul City R. Co.*, 60 Minn. 192, 68 N. W. 862, evidence sufficient to justify finding of negligence in starting a car while passenger was boarding; *Armstrong v. Met. St. Ry. Co.*, 23 App. Div. (N. Y.) 137, 48 N. Y. Supp. 597, evidence insufficient to show negligence in starting while passenger was alighting; *Reiten v. Lake St. El. R. Co.*, 85 Ill. App. 657, evidence insufficient to show that the relation between passenger and carrier existed; *West Chicago St. R. Co. v. Williams*, 87 Ill. App. 548, evidence sufficient to sustain finding of negligence in gripman in not stopping car in time to avoid

collision; *Steele v. Consol. Trac. Co.*, (Pa.) 39 Pittsb. Leg. J. N. S. 290, defendant's evidence not sufficient to overcome the presumption of negligence arising from the accident to plaintiff, a passenger, who was injured by the pole of a wagon entering the car and striking his leg; *McCready v. Staten Island R. Co.*, 51 App. Div. (N. Y.) 338, 64 N. Y. Supp. 996, evidence sufficient to sustain a finding that collision was severe enough to cause plaintiff's injuries; *Benson v. Manhattan Ry. Co.*, 31 Misc. Rep. (N. Y.) 723, 65 N. Y. Supp. 271, banana peeling on street railway station stairway causing passenger to fall will not support verdict for negligence, in absence of showing negligence in permitting it to remain there; *Bass v. Concord St. Ry.*, 70 N. H. 170, 46 Atl. 1056, evidence of negligence sufficient for not stopping car at safe place for passenger to alight; *Schmeltzer v. St. Paul City Ry. Co.*, 80 Minn. 50, 82 N. W. 1092, evidence insufficient to show negligence in backing car while passenger was attempting to board it; *Brainard v. Nassau Elec. R. Co.*, 44 App. Div. (N. Y.) 613, 61 N. Y. Supp. 74, evidence sufficient to justify finding that fall of passenger from car was due to negligence in operation; *Rusk v. Manhattan Ry. Co.*, 46 App. Div. (N. Y.) 100, 61 N. Y. Supp. 384, evidence insufficient to warrant finding that depression in platform at bottom of stairway was the proximate or a concurrent cause of accident; *Hoffman v. Third Ave. R. Co.*, 45 App. Div. (N. Y.) 586, 61

fendant which directly contributed to the injury complained of.<sup>83</sup> Where the case proceeds in the trial court as though no issue is made and no contest is had with respect to the matter of ownership or operation of the railway, full full proof of such fact is not required, and slight evidence tending to support the inference that defendant owns or operates the road will be sufficient when it is not combated, and the entire case is conducted by defendant upon a theory indicating its responsibility, except for other causes which are relied upon solely for acquittal of the negligent act as where no intimation is made that defendant resists the claim asserted

N. Y. Supp. 590, evidence insufficient to show negligence in sudden stopping of car; *Faris v. Brooklyn City & N. R. Co.*, 46 App. Div. (N. Y.) 231, 61 N. Y. Supp. 670, evidence sufficient to show negligence in collision with truck; *Black v. Second Ave. R. Co.*, 44 App. Div. (N. Y.) 333, 60 N. Y. Supp. 631, verdict for plaintiff for injury received while alighting from car set aside as against the weight of evidence; *Samuels v. California St. Cable R. Co.*, 124 Cal. 294, 56 Pac. 1115, evidence sufficient to establish negligence in management of car in rounding curves at rapid speed; *Basting v. Brooklyn H. R. Co.*, 39 App. Div. (N. Y.) 629, 57 N. Y. Supp. 119, evidence sufficient of negligence in sudden starting of car while passenger was alighting; *Bourque v. New Orleans City & L. R. Co.*, (La.) 24 So. 622, (same); *Fraser v. London St. R. Co.*, (Div. Ct.) 29 Ont. Rep. (Can.) 411, evidence sufficient to justify finding of an implied invitation to stand on the footboard of an electric car; *Holman v. Union St. R. Co.*, 114 Mich. 208, 4 Detroit Leg. N. 518, 9 Am. & Eng. R. Cas. N. S. 105, 72 N. W. 202, evidence sufficient to show that motorman was inexperienced and incompetent; *Gray v. Ro-*

*chester City & B. R. Co.*, 61 Hun (N. Y.) 212, 40 St. Rep. (N. Y.) 715, 15 N. Y. Supp. 927, evidence that tracks were nearer together at point of accident than elsewhere on the road sufficient proof of negligence causing injury to passenger struck by another car passing; *Meyerowitz v. Interurban St. Ry. Co.*, 84 N. Y. Supp. 233, evidence of negligence insufficient in an action for injuries sustained while boarding car; *Clancy v. Yonkers R. Co.*, 84 N. Y. Supp. 789, judgment for plaintiff in action for injury from starting of car against the weight of evidence.

**83.** *Siacik v. Northern Cent. Ry. Co.*, 92 Md. 213, 48 Atl. 149; *Dixey v. Phila. Traction Co.*, 180 Pa. St. 401, 36 Atl. 924. The testimony of plaintiff that, when he started to cross the street, the car which struck his wagon was at a certain point, will be disregarded where the team, going a little faster than a walk, as testified to, would have been far beyond the track within the time necessary for the car, going at the highest speed testified to, to have reached the place of accident. *Bronscheuer v. Consolidated Traction Co.*, 198 Pa. St. 332, 47 Atl. 872.

on the ground that it was not responsible as owner or operator.<sup>84</sup> A *prima facie* case of negligence is made out, and no contributory negligence shown, by testimony that about daylight the driver of a team, on which there was a light, turned his horse across street car tracks at a street crossing, seeing a street car about a block away, and had got the horses and about half the wagon across the tracks, when the car, coming with great speed and no warning, struck it.<sup>85</sup> Evidence that a street car propelled at a very rapid

84. O'Keefe v. United Rys. Co., 124 Mo. App. 613, 5 St. Ry. Rep. 666, 101 S. W. 1144. See Carey v. Metropolitan St. Ry. Co., 125 Mo. App. 188, 5 St. Ry. Rep. 690, 101 S. W. 1123.

85. Sophian v. Met. St. Ry. Co., 38 Misc. Rep. (N. Y.) 787, 78 N. Y. Supp. 837. Plaintiff was driving along the side of a street, two or three feet from the street car track nearest him. He testified that before attempting to cross he looked and saw a car 450 feet distant, and that he thought he had plenty of time to cross, and that, though his team was trotting while he endeavored to cross, and he endeavored to hurry them, he was struck. The evidence as to the distance of the car was conflicting. *Held*, that a finding in favor of plaintiff on that issue would not be disturbed on appeal. Campbell v. Los Angeles Traction Co., 137 Cal. 565, 70 Pac. 624.

**Cases in which the sufficiency of evidence of negligence in collisions between street cars and other vehicles has been passed upon by the courts are cited below:** Horgan v. Jones, 131 Cal. 521, 63 Pac. 835, collision with rear end of heavy truck; Elwood v. Chicago City Ry. Co., 90 Ill. App. 397, truck loaded with pipe driving along track; Seifter v. Brooklyn H. R. Co., 55 App. Div. (N. Y.) 10, 66 N. Y. Supp.

1107, collision with covered business wagon driving along the street; Citizens' St. R. Co. v. Washington, (Tex. Civ. App.) 58 S. W. 1042, wagon crossing track while car was crossing on a down grade in the same direction; Armstead v. Mendenhall, 83 Minn. 136, 85 N. W. 929; Stines v. Met. St. Ry. Co., 34 Misc. Rep. (N. Y.) 789, 69 N. Y. Supp. 992, van crossing track; Jackson v. United Traction Co., 18 Pa. Super. Ct. 211; head-on collision with a wagon; Vincent v. Norton & T. St. Ry. Co., 180 Mass. 104, wagon run down and occupants thrown out and injured; Montenes v. Met. St. Ry. Co., 78 N. Y. Supp. 1059, collision between car and a cab at a crossing; Campbell v. Los Angeles Traction Co., 137 Cal. 565, 70 Pac. 624, team driving along the track; Birmingham Ry. & Elec. Co. v. Franscomb, 124 Ala. 621, 27 So. 508, wagon being driven ahead and in the way of defendant's car; Jacksonville Ry. Co. v. Lamb, 86 Ill. App. 487, injury while driving across track; Atwood v. Bangor, etc., R. Co., 91 Me. 399, 40 Atl. 67, collision with team standing near track; Calumet Elec. St. Ry. Co. v. Nolan, 69 Ill. App. 104, vehicle run down by car; Peterson v. St. Paul City R. Co., 54 Minn. 152, 55 N. W. 906; Austin R. T. R. Co. v. Cullen, (Tex.) 29 S. W. 256.

rate over an intersecting street, without any signal or warning, and without a bright headlight, and that the motorman had his face turned toward the rear of the car when it struck plaintiff, who was crossing the street, was sufficient to warrant a finding of negligence on the part of the defendant.<sup>86</sup> Where defendant's car was running fast, and the motorman, when he was within one hundred and twenty-five feet of a child which was approaching the track, heard a woman scream in the second story, and looked in that direction, and then looked back into the car, and did not discover the child until close upon it, the evidence was sufficient to support a finding that the motorman was negligent.<sup>87</sup> In an action for failure to fill up an excavation made in a street, whereby plaintiff was injured, that before the ex-

**86.** *Mitchell v. Third Ave. R. Co.*, 62 App. Div. (N. Y.) 371, 70 N. Y. Supp. 1118.

**Other cases of injury to pedestrians where the evidence of negligence was held sufficient:** *Henderson v. Union Traction Co.*, 202 Pa. St. 527, 51 Atl. 1027, evidence conflicting as to rate of speed and ringing the bell; *Schneider v. Market St. Ry. Co.*, 134 Cal. 82, 66 Pac. 734, car going at more than statutory rate of speed; *McClusky v. Met. St. Ry. Co.*, 67 App. Div. (N. Y.) 617, 73 N. Y. Supp. 324; *Shaughnessy v. Consol. Traction Co.*, 17 Pa. Super. Ct. 583; *Walker v. St. Paul City Ry. Co.*, 81 Minn. 404, 51 L. R. A. 632; *Fandel v. Third Ave. R. Co.*, 162 N. Y. 598, 57 N. E. 1110; *affg.* 15 App. Div. (N. Y.) 426, 44 N. Y. Supp. 462; *Kernan v. Market St. Ry. Co.*, 137 Cal. 326, 70 Pac. 81; *Chicago City Ry. Co. v. Loomis*, 201 Ill. 118, 66 N. E. 348; *Barry v. Burlington Ry. & L. Co.*, 119 Iowa 62, 93 N. W. 68, 95 N. W. 229; *San Antonio Traction Co. v. Court*, (Tex. Civ. App.) 71 S. W. 777; *Devine v. Met. St. Ry. Co.*, 29 Misc.

*Rep.* (N. Y.) 301, 60 N. Y. Supp. 520; *revg.* 58 N. Y. Supp. 1138.

**Evidence held insufficient:** *Cowden v. Shreveport Belt Ry. Co.*, 106 La. 236, 30 So. 747; *Ryan v. La Crosse City Ry. Co.*, 108 Wis. 122, 83 N. W. 770; *Mahrle v. Brooklyn, etc., R. Co.*, 59 App. Div. (N. Y.) 617, 69 N. Y. Supp. 210, deaf person walking along track and suddenly starting to cross in front of car.

**87.** *Fullerton v. Met. St. Ry. Co.*, 63 App. Div. 1, 71 N. Y. Supp. 326. In an action for injury to a child of tender years the evidence was held insufficient to show that the child was of sufficient intelligence or capacity to exercise any care of his own safety, especially in view of the presumption that defendant obeyed the law and exercised greater care at the crossings frequented by school children than at the ordinary crossing where the child was injured. *Chicago City R. Co. v. Tuohy*, 196 Ill. 410, 63 N. E. 997; *affg.* 95 Ill. App. 314.

**Other cases of injury to children where the evidence of negligence was held sufficient:** *Welsh*

cavation water ran into the defendant's switch, that the excavation ran under the track, and had the appearance of having been made by digging; and that while it was there defendant's employees were working nearby, was sufficient, in the absence of any evidence to the contrary, to justify a finding that the excavation had been made by the defendant.<sup>88</sup> Testimony that plaintiff drove forward to go over a street railway crossing at signal from the company's inspector, and that as the horses got on the track the inspector signaled a car to cross, and plaintiff pulled back as far as he could, but, there being a curve in the track, the rear of the car swung out and struck the team, is sufficient for a finding that the accident resulted from negligence of the inspector, it not necessarily following that the front of the car would swing out equally far at that point, so that plaintiff must have advanced after the front got by.<sup>89</sup> In an action for injuries received by

*v. United Traction Co.*, 202 Pa. St. 530, 51 Atl. 1026, car going down hill on a dark night; *Adams v. Met. St. Ry. Co.*, 60 App. Div. (N. Y.) 188, 69 N. Y. Supp. 1117, child playing in the street; *Elwood Elec. St. Ry. Co. v. Ross*, 26 Ind. App. 258, 58 N. E. 535; *Muller v. Brooklyn H. R. Co.*, 18 App. Div. (N. Y.) 177, 45 N. Y. Supp. 954; *San Antonio v. Mechler*, 87 Tex. 628, 30 S. W. 899; affg. 29 S. W. 202.

**Evidence of negligence insufficient:** *Tishacek v. Milwaukee Elec. Ry. & L. Co.*, 110 Wis. 417, 85 N. W. 971; *Smith v. Kansas City El. Ry. Co.*, 61 Kan. 862, 60 Pac. 1059, a charge of negligence against a street railroad company cannot be predicated on an unexplained accident to a child; *Brady v. Consol. Trac. Co.*, 64 N. J. L. 373, 45 Atl. 805; *Lorickic v. Brooklyn H. R. Co.*, 44 App. Div. (N. Y.) 628, 60 N. Y. Supp. 247.

**88.** *Kearns v. South Middlesex St. Ry. Co.*, 181 Mass. 587, 64 N. E. 200;

*Williams v. Minneapolis St. Ry. Co.*, 88 Minn. 79, 92 N. W. 479, injuries from defects in paving. Where one railroad company, in laying its tracks through a city street, left an obstruction therein, over which plaintiff fell and was injured, and subsequently leased its road to another corporation, which operated the same, in the absence of anything further to connect the lessee with the accident, the complaint was properly dismissed as to such lessee. *Higgins v. Brooklyn, Q. C. & S. R. Co.*, 66 N. Y. Supp. 334, 54 App. Div. 69; *Simon v. Met. St. Ry. Co.*, 29 Misc. Rep. (N. Y.) 126, 60 N. Y. Supp. 251.

**89.** *Fay v. Brooklyn H. R. Co.*, 69 App. Div. (N. Y.) 563, 75 N. Y. Supp. 113. In an action against a street railway company for injuries caused by a collision, evidence that plaintiff had reached the middle of a bridge over which the street car passed when the car was ninety feet from the end of the bridge, with

plaintiff's decedent, a street sweeper, where plaintiff's evidence tended to show that decedent was standing between the tracks, that the car approached rapidly, without warning, until within ten feet of decedent, who then looked up, but could not avoid the injury; defendant's evidence tended to show that the car was moving slowly, and the bell ringing, that decedent stepped back onto the track; and that the car could not be stopped, the proofs were held to support a judgment for plaintiff.<sup>90</sup> Contributory negligence by a person killed by a street car is sufficiently established by evidence that he was deaf, and that he could not have failed to discover the approaching car if he had looked in the direction from which it came before attempting to cross the track.<sup>91</sup> That a piece of an elevated railroad platform knocked out in handling timbers upon the railroad, and falling into the street so as to injure a person below, is so rotten that it may be broken by the hand, and that its condition is discoverable by ordinary inspection, is sufficient evidence of negligence on the part of the railroad company to go to the jury.<sup>92</sup> The presumption of negligence on the part of an elevated railroad company, arising from an injury due to the falling of an iron plate upon the breaking of a bolt which held it in place, is not overthrown by the testimony of defendant's track-walker to inspection of the track, but not to examination of the bolt that was broken.<sup>93</sup> Evidence by the plaintiff that as she was passing under an elevated railroad track some one called to her "look out" when she saw a wrench falling from above, and, to avoid it, threw herself forward, breaking her ankle, the wrench falling close beside her, is sufficient to sustain a verdict in her favor, although an employee of the company testifies that no

nothing to prevent the motorman from seeing the wagon, and that such motorman came on the bridge, which was too narrow to allow the car to pass the wagon, and collided with it, is sufficient to warrant a verdict for damages. *Joliet R. Co. v. Barty*, 96 Ill. App. 351.

**90.** *O'Connor v. Union Ry. Co.*, 67

App. Div. (N. Y.) 99, 73 N. Y. Supp. 606.

**91.** *Beem v. Tama & T. Elec. R. & L. Co.*, 104 Iowa, 563, 73 N. W. 1045, 10 Am. & Eng. R. Cas. N. S. 610.

**92.** *Anderson v. Manhattan R. Co.*, 1 Misc. Rep. (N. Y.) 504, 49 St. Rep. (N. Y.) 233, 21 N. Y. Supp. 1.

**93.** *Volkmar v. Manhattan R. Co.*,

woman was within fifteen feet of it, and four other employees testify that they saw the wrench fall, but saw no woman.<sup>94</sup> Evidence that the railroad company laid a switch across a city sidewalk in such a manner that a space wide enough to catch and hold a man's foot was left between the movable rail and a plank in a sidewalk is sufficient to sustain a finding of culpable negligence.<sup>95</sup> In action against a street railway company by the conductor of a cable street car of another company for injuries by being thrown from the car, evidence that the accident occurred from the displacement of the slot at the crossing of the road of the former company; that plaintiff's train was running at half the usual speed, and on account of the obstruction his train was suddenly stopped, whereby he was thrown forward and his shoulder dislocated; and that such crossing was undergoing repairs by the defendant, the work being done underground so as to be exclusively within the knowledge of defendant's workmen, makes a *prima facie* case of negligence on the part of defendant.<sup>96</sup>

§ 482. Evidence in other actions — When Insufficient. — Where plaintiff's intestate was run over and killed by defendant's street car, and action was brought on the theory that such intestate was lying on or near the track in an unconscious condition when struck, and that the defendant was negligent in running its car at an excessive rate of speed and in failing to discover the deceased, the fact that deceased, while somewhat intoxicated, alighted from another car, about a quarter of an hour before the accident, near the place thereof, when there was no evidence as to the rate of speed of the car which struck him, or that he was lying in an unconscious condition on or near the track, was insufficient to establish negligence.<sup>97</sup> In an action for negligent death, where there

134 N. Y. 418, 47 St. Rep. (N. Y.) 631, 31 N. E. 870, 30 Am. St. Rep. 678.

94. Brooks v. Kings Co. Elec. R. Co., 4 Misc. Rep. (N. Y.) 288, 53 St. Rep. (N. Y.) 452, 23 N. Y. Supp. 1031.

95. Toledo, etc., R. Co. v. Clark,

49 Ill. App. 17, *affd.*, 147 Ill. 171, 35 N. E. 167.

96. Minster v. Citizens' R. Co., 53 Mo. App. 276.

97. Mathison v. Staten Island M. R. Co., 66 App. Div. (N. Y.) 610, 72 N. Y. Supp. 954.

was no evidence as to what deceased did for several minutes intervening between the time when he was seen walking along the north side of the street and the time when he was seen lying face downward across the track immediately in front of the car on the south side of the street, whether he tried to pass before an approaching car and fell or stood too near the car, or was seized with vertigo, there was not sufficient proof that deceased was in the exercise of due care to justify a recovery.<sup>98</sup> In an action for injuries alleged to have been caused by snow and ice thrown by a sweeper used by defendant to clear the snow from its tracks, in the absence of proof that the snow or ice which had caused the injury, and which plaintiff said came from the direction of the sweeper, did in fact come from the sweeper, and in the absence of proof that this was the result of negligence which could have been avoided, a verdict for plaintiff cannot be sustained.<sup>99</sup> That plaintiff's house was injured by the bumping of defendant's cars over a switch eighty feet away is not shown by evidence that, while cracks opened up in the thirteen-inch brick wall of the building, the walls were not out of plumb, and no mortar came loose, as would naturally result from vibrations.<sup>1</sup> A finding that plaintiff's injuries were caused by the negligence of defendant's motorman is not sustained by evidence that plaintiff's horse was running away at the time it crossed the street car track, and that plaintiff on seeing the car approaching called to the motorman to stop the car, and that the car was not stopped.<sup>2</sup> One injured because his horse backed the wagon in front of an approaching car, which he

**98.** *Cox v. South Shore & B. St. Ry. Co.*, 182 Mass. 497, 65 N. E. 823.

**99.** *Connor v. Met. St. Ry. Co.*, 48 App. Div. (N. Y.) 580, 63 N. Y. Supp. 509.

**1.** *Starr v. North Side Traction Co.*, 193 Pa. St. 536, 44 Atl. 556. See *Hogan v. Citizens Ry. Co.*, 150 Mo. 36, 51 S. W. 473; *Isaackson v. Durduth Street Ry. Co.*, 75 Minn. 27, 77 N. W. 433; *Sanders v. Southern Elec. Ry. Co.*, 147 Mo. 411, 48 S. W. 855;

*Walbridge v. Schuylkill Electric Ry. Co.*, 190 Pa. St. 274, 42 Atl. 689.

**2.** *Phillips v. People's Pass. R. Co.*, 190 Pa. St. 222, 43 W. N. C. 531, 42 Atl. 686, 5 Am. Neg. Rep. 719. In an action for injuries sustained in being thrown from a frightened horse, evidence held insufficient to show that the car was so operated as to be the direct and sole cause of the fright of the horse, which resulted in plaintiff's injuries, *McKinney v. United Traction*

alleges was running at an unlawful rate of speed, is properly nonsuited where his evidence in this respect is a pure guess which is contradicted by a number of disinterested witnesses.<sup>3</sup> A finding by the jury that the horse of plaintiff, in an action to recover for being struck by a cable car, did not catch his foot in the cable slot, together with evidence tending to show that plaintiff attempted to cross so close in front of an approaching car that his horse was struck on the shoulder, conclusively shows the plaintiff to have been guilty of contributory negligence.<sup>4</sup> Where it was alleged that a fire, which destroyed plaintiff's mill, originated from a live trolley wire, and, on the trial, plaintiff's testimony showed that after he discovered the fire, he, without noticing the live wire, passed over the place where, subsequently, other persons found the trolley wire writhing and twisting on the ground, it was held insufficient to make a *prima facie* case.<sup>5</sup>

§ 483. Evidence as to contributory negligence. — Where, in an action against a street car company for injuries, defendant's evidence clearly shows that plaintiff received her injuries in attempting to alight from a moving car, and plaintiff's case rests on her unsupported testimony, partially contradicted by her own witnesses and by the circumstances of the case, a verdict in her favor cannot be sustained.<sup>6</sup> But, where in an action for injuries sustained in alighting from a street car by reason of the slippery condition of the steps, plaintiff testified that she knew that she had to look out for herself, because it was slippery, and so held the handle of the car dasher, the jury was warranted in finding

Co., 19 Pa. Super. Ct. 362. Negligence on the part of an electric street railway company may be inferred from evidence that a car overtaking a woman in obvious difficulty with a horse she was driving was not stopped or slackened in speed, and that the gong was sounded before overtaking her and when alongside, Benjamin v. Holyoke St. R. Co., 160 Mass. 3, 35 N. E. 95.

3. Smith v. Holmesburg, T. & F. Elec. R. Co., 187 Pa. St. 451, 41 Atl. 479.

4. O'Connell v. St. Paul City R. Co., 64 Minn. 466, 67 N. W. 363, 4 Am. & Eng. R. Cas. N. S. 60.

5. Imeson v. Tacoma Ry. & P. Co., 42 Wash. 74, 4 St. Ry. Rep. 1062, 84 Pac. 624.

6. Hogan v. Met. St. Ry. Co., 71 App. Div. (N. Y.) 614, 75 N. Y. Supp.

that she knew that the step was slippery and exercised due care in view of that knowledge.<sup>7</sup> Where the evidence showed that, at the time of the injury to the arm of the street car passenger by another car passing on a switch, he was sitting beside an open window, reading, with his elbow resting on the sill, without reason to suppose that the cars would be run so close to each other, and the only circumstance showing want of care on his part was that his elbow might have extended not more than three inches beyond the sill, such evidence was sufficient to justify a finding that such passenger was using reasonable care at the time of the accident.<sup>8</sup> Where plaintiff, riding on a street car, signaled the conductor to stop at the next stopping point; the motorman stopped the car, because he saw a fire engine approaching, and plaintiff, under the misapprehension that the car had reached her destination, stepped into the street and was injured by a rapidly passing horse car; it was about eight o'clock in the evening, and plaintiff, who was familiar with the street, testified that she thought she took pains to find out whether anything was approaching, and that she was looking and thought the way was clear, the evidence did not show her guilty of contributory negligence.<sup>9</sup> An ordinance prohibiting any person not a regular employee, from jumping on or off a street railway car while the same is in motion, is admissible in evidence on the issue of a plaintiff's contributory negligence in jumping from the car while in motion.<sup>10</sup>

845. See also *Ebling v. Second Ave. R. Co.*, 60 App. Div. (N. Y.) 616, 69 N. Y. Supp. 1102.

7. *Foster v. Old Colony St. Ry. Co.*, 182 Mass. 378, 65 N. E. 795.

8. *Tucker v. Buffalo Ry. Co.*, 169 N. Y. 589, 62 N. E. 1101, affg. 53 App. Div. (N. Y.) 671, 65 N. Y. Supp. 989.

9. *Oddy v. West End St. Ry. Co.*, 178 Mass. 341, 59 N. E. 1026. In the case last cited it was also held that, since it was proper to stop the car, and not customary to notify passengers of the cause of a stoppage from an obstruction in the street, and as

the conductor, who was at the rear of the car, looking over the closed gate on the left-hand side, in order to see when the fire wagons had passed, was attending to his duty as required, the company was guilty of no negligence. As to sufficiency of evidence of contributory negligence, see also cases cited under sections referring to sufficiency of evidence in actions for personal injuries and other actions, §§ 3, 4, *ante*.

10. *Denison & Sherman Ry. Co. v. Carter*, 98 Tex. 196, 3 St. Ry. Rep. 833, 82 S. W. 782.

§ 484. **Issues, proof, and variance.** — The practical application of well-established principles and rules of pleading to actions for personal injuries sustained through negligence has been made by the court in numerous cases. Where a complaint in an action for injuries to a passenger on a street car charged negligence, in permitting the bearing on one of the wheels to become overheated, a variance between such allegation and the proof, which showed that the bearings were not overheated, but that the plate over the wheel was overheated by friction caused by the plate being pressed against the wheel, which proof was made by defendant's witnesses, was not material, being a variance which had in no way misled the defendant.<sup>11</sup> In an action where the complaint detailed the striking of plaintiff by defendant's motorman, and alleged a cause of action founded not only on negligence, but upon violence on the part of defendant's servant, and the evidence showed that, as plaintiff stepped on the car, the motorman, without cause, struck plaintiff violently, saying "You get off;" though the proofs showed a wilful assault, the variance was immaterial as it could not have misled the defendant.<sup>12</sup> A complaint in an action for injuries to a passenger, alleging that while plaintiff was attempting to board a car the conductor negligently and recklessly interfered, so that he was thrown from the car and injured, is supported by proof that while plaintiff was standing on the car steps the conductor wilfully knocked him from the car, the assault being in

11. *Powell v. Hudson Val. Ry. Co.*, 84 N. Y. Supp. 337, and where defendant railway company was organized by a consolidation of the G. & S. and S. & M. railway companies, the fact that the complaint in an action for injuries to a passenger charged that injuries occurred on the line operated by the S. & M. Railway Co., while the proof showed that it was in fact on the G. & S. Railway Co.'s line, did not constitute a prejudicial variance.

12. *Moritz v. Interurban St. Ry. Co.*, 84 N. Y. Supp. 162, and where

plaintiff testified that while standing on the platform of a car the motorman struck him on the chest violently, that he felt faint and had pains in his chest for two or three hours afterward, and that he had dreams at night of being struck and falling from a car, which sensations apparently continued from the time of the accident, and a physician testified that he found plaintiff's heart weak, and that such blows might have caused the injuries, the evidence warranted a finding that the blows caused the injuries.

law a negligent act on the part of defendant; and a complaint alleging that the conductor in charge of a street car was unfit, and that defendant knew, or should have known it, and that the accident happened wholly through defendant's negligence, is supported by proof that while plaintiff was standing on the car step the conductor wilfully knocked him from the car.<sup>13</sup> It has been held that where plaintiff alleged that defendant's street car stopped, and as he endeavored to step on the platform the motorman negligently let off the brake, causing the car to lurch forward and injure plaintiff, and the evidence showed that the car was moving slowly when the plaintiff attempted to enter, there was no variance between the allegations and the proof, since the allegation that the car stopped was a matter of inducement, and the gravamen of the complaint was the negligence in releasing the brake;<sup>14</sup> that under a complaint alleging that, as plaintiff was alighting from a street car, it was started forward, with a sudden quick jerk, which threw her to the ground, it need not be shown that it was started forward, but that it is enough that it gave a sudden jerk, causing the accident;<sup>15</sup> that where a petition for injuries to a passenger on a street car merely charged that the accident was caused by defendant's negligence, defendant is not required to prove what caused the car to get beyond its control; and where plaintiff, suing for injuries received in a street car accident, limited his right to recover to a specific act of negligence of defendant, he could not avail himself of the general rule that a passenger is only obliged to allege generally and prove the relation of passenger and carrier and the injury, to make out a *prima facie* case, and that the burden then shifts to the carrier to exonerate himself.<sup>16</sup> Where the com-

13. *Willis v. Met. St. Ry. Co.*, 76 App. Div. (N. Y.) 340, 78 N. Y. Supp. 478.

14. *Hansberger v. Sedalia Elec. Ry., L. & P. Co.*, 82 Mo. App. 566. See also *Ridenhour v. Kansas City Cable Ry. Co.*, 102 Mo. 270, 13 S. W. 889, there is no variance between allegations that defendant stopped its car to allow plaintiff to alight and

negligently put it in motion while plaintiff was alighting. and proof that the car slowed up only and then started up with a sudden jerk.

15. *Citizens' St. Ry. Co. v. Huffer*, 26 Ind. App. 575, 60 N. E. 316.

16. *Feary v. Met. St. Ry. Co.*, 162 Mo. 75, 62 S. W. 452. See also *Dougherty v. Missouri P. R. Co.*, 97 Mo. 647, 8 S. W. 900, holding that

plaint alleged that plaintiff was injured by a forward movement of a car after the passenger had been discharged, and it appeared that it happened after the car had stopped and had begun to move backward to a point opposite a platform in order to discharge passengers, and it did not appear that the defendant was missed, the variance was not fatal.<sup>17</sup> Where a count in a declaration alleges that plaintiff, while attempting to board an electric street car, was thrown between the cars, and the evidence showed that after stepping on the platform of the car he was thrown under the car, it

under an averment that the defendant carelessly and negligently operated its car in which plaintiff was a passenger, he may offer evidence as to the disposition of the horses, whether vicious or not, as the cause of the car being so managed as to throw him down and cause the injury complained of.

**But, under a general allegation of the defendant's negligence,** it is error to admit evidence, or to give instructions to the jury, as to the general condition of the tracks of defendant's railway. *Miller v. St. Louis R. Co.*, 5 Mo. App. 471. Evidence tending to show that the cars were propelled in a safe and proper manner is properly excluded, where the petition does not charge negligence in the manner of propelling defendant's cars. *Brooklyn St. R. Co. v. Kelley*, 6 Ohio C. C. 155. Evidence showing the defective construction of the car, as well as carelessness on the part of the driver, is admissible under a charge that the defendant by the wrongful act, negligence and default of its servants and agents ran over a child and caused its death. *Oldfield v. N. Y. & H. R. Co.*, 14 N. Y. 210; *affg.* 3 E. D. Smith (N. Y.) 103. Where, in an action

against a cable railway company by a passenger for injuries received in a collision of a grip car with another car temporarily stopped on the same track, the declaration alleges negligence in the defendant in operating its road and the cars propelled thereon, evidence that the colliding grip car was a remodeled horse car and was not provided with a sandbox is admissible as bearing on the charge made, although it also tends to support a charge of negligence not made in the declaration. *North Chicago St. Ry. Co. v. Cotton*, 140 Ill. 486, 29 N. E. 899, 24 Chic. Leg. News, 252. And where the injuries are alleged to have been caused by the wilful acts of the defendant's servants, it is error to refuse to charge that, under the pleadings, the plaintiff cannot recover for mere negligence. *Highland Ave. & Belt R. Co. v. Winn*, 93 Ala. 306, 9 So. 509. But see *Wabash R. Co. v. Kingsley*, 177 Ill. 558, 59 N. E. 931, 5 Am. Neg. Rep. 554, 13 Am. & Eng. R. Cas. N. S. 835; *revg.* 78 Ill. App. 236; *Chicago & E. I. R. Co. v. Driscoll*, 4 Chic. L. J. Wkly. 130, *revg.* 70 Ill. App. 91.

**17.** *Robinson v. Helena Light & Ry. Co.*, (Mont.) 6 St. Ry. Rep. 653.

proves a variance.<sup>18</sup> An offer to prove that the condition of the tracks was bad where they intersected, and that by reason of such a condition plaintiff was thrown from the footboard, was properly excluded, no negligence being charged in the complaint.<sup>19</sup> Where the complaint alleged that the motorman negligently permitted plaintiff, a minor, to ride on the footboard from the time he first boarded the car, and the testimony of both plaintiff and the motorman showed that the plaintiff rode on the front platform until within a square of his home, where it was the motorman's purpose to stop and let him off, at which point he stepped down on the footboard for the purpose of leaving the car, it was a variance from the declaration; and testimony that plaintiff, while standing on the footboard, lost his balance, because of the rough condition of the track and consequent jolting of the car, was inadmissible, where not averred in the declaration.<sup>19a</sup> Where a complaint alleged that defendant negligently "caused" a car to start, there is no variance if the evidence shows that they did not actively cause the car to start, but that their passive negligence permitted it.<sup>20</sup> Evidence that some of plaintiff's injuries were caused by being thrown upon the ground by the sudden starting of a street car which he was attempting to board is not a material variance from an averment that the injuries were received from being thrown against the side of the car.<sup>21</sup> Evidence that a passenger alighted from a street car at a place a short distance from a transfer station, where it did not usually stop to let off passengers, for the purpose of going to his place of work, is not a material variance from an averment of the complaint that his object in alighting was to obtain a transfer to another car.<sup>22</sup> Where the complaint bases the

**18.** Birmingham Ry. & Elec. Co. v. Brannon, 132 Ala. 431, 31 So. 523.

**19.** Nies v. Brooklyn H. R. Co., 68 App. Div. (N. Y.) 259, 74 N. Y. Supp. 41.

**19a.** Richmond Ry. & Elec. Co. v. West, 100 Va. 184, 4 Va. Super. Ct. 112, 40 S. E. 643.

**20.** Asbury v. Charlotte Elec. Ry., L. & P. Co., 125 N. Car. 568, 34 S. E.

654. See Fitzgibbon v. Chicago & N. W. R. Co., 108 Iowa, 614, 79 N. W. 477; Pierce v. Railway Co., 22 Mont. 445; Bartley v. Railway Co., 148 Mo. 124, 49 S. W. 840; Chitty v. Railway Co., 124 Mo. 64.

**21.** Christie v. Galveston City R. Co., (Tex. Civ. App.) 39 S. W. 638, 2 Am. Neg. Rep. 260.

**22.** Washington & G. R. Co. v.

defendant's negligence on the failure of the motorman to give any signal on the approach of the car, recovery cannot be had on evidence showing a negligent ringing of the car bell causing plaintiff's horses to become frightened and unmanageable — especially where there is no evidence that the horses showed symptoms of fright until they jumped ahead of the car.<sup>23</sup> It was held proper to exclude evidence of the general character and disposition of the conductor who ejected plaintiff, where the complaint did not allege the employment of an incompetent conductor.<sup>24</sup> Evidence that the plaintiff was thrown from the car before actual collision, or jumped to escape an impending collision, is not a material variance from an allegation that she was violently thrown from the car and injured because of a collision with another car, and that such collision was caused by the negligence of the defendant's servants operating such car.<sup>25</sup> Averment in a petition in an action by a passenger against a street railway company for personal injuries, that the car was stopped for the purpose of allowing him to get off, does not prevent a recovery upon the hypothesis that the car had not stopped for that purpose, but that plaintiff, under the circumstances, was justified in supposing that it had.<sup>26</sup> Evidence that electricity was communicated to a metal plate upon a street car by induction in damp weather does not sustain allegations of the declaration that the apparatus attached to the car was dangerously charged with electricity.<sup>27</sup> As a general rule, plaintiff in an action for personal injuries must recover, if at all, on and according to the case he has made for himself in his declara-

Grant, 11 App. D. C. 107, 25 Wash. L. Rep. 342.

**23.** Flaherty v. Harrison, 98 Wis. 559, 74 N. W. 360, 10 Am. & Eng. R. Cas. N. S. 176.

**24.** Braymer v. Seattle R. & S. Ry. Co., 35 Wash. 346, 3 St. Ry. Rep. 901, 77 Pac. 495.

**25.** Toledo Elec. St. R. Co. v. Bate-man, 8 Ohio C. D. 220. Proof that a passenger jumped from a car in a reasonable effort to avoid injury from

a collision is not a fatal variance from a declaration that she was pushed and shoved from the car by other passengers endeavoring in a reasonable manner to avoid injury from a collision. Washington & G. R. Co. v. Hickey, (D. C. App.) 23 Wash. L. Rep. 177.

**26.** Belt Elec. Line Co. v. Tomlin, 19 Ky. L. Rep. 433, 40 S. W. 925.

**27.** East St. Louis Elec. St. R. Co. v. Steger, 65 Ill. App. 312.

tion, and cannot make one case by his allegations and recover in a different case made by his proof.<sup>28</sup> Evidence of simple negligence does not authorize recovery under a count charging defendant and with wantonness and wilfulness in inflicting the injury complained of.<sup>29</sup> There is a fatal variance between an allegation in a complaint in an action for slander, that an officer of defendant stated that the plaintiff was discharged from the employ of the company for the misuse of checks, and proof that he stated that he had authority to discharge plaintiff and another for misuse of checks.<sup>30</sup> The variance between a declaration that a collision occurred in a specified city, and proof that it occurred about forty feet outside in the center of a street extending beyond the limits of the city, is material.<sup>31</sup> Recovery may be had in an action for personal injuries upon proof of an action at any time before the time alleged in the complaint, not beyond the period of limitation.<sup>32</sup> In an action against a carrier to recover for injuries sustained while alighting from a car, evidence of particular acts of defendant at the time, illustrating the manner in which plaintiff

**28.** *Ebsery v. Chicago City R. Co.*, 164 Ill. 518, 45 N. E. 1017. But it is not necessary to prove every distinct act of negligence alleged in a complaint, where the acts alleged and proved are sufficient to render defendant liable without regard to those not proved. *Thayer v. Flint & P. M. R. Co.*, 93 Mich. 150, 53 N. W. 216; *St. Louis & T. H. R. Co. v. Egemann*, 161 Ill. 155, 43 N. E. 620.

**29.** *Levin v. Memphis & C. R. Co.*, 109 Ala. 332, 19 So. 395. Evidence of reckless, wanton, or wilful negligence is not a material variance from a complaint covering only simple negligence. *Louisville & N. R. Co. v. Hurt*, 101 Ala. 34, 13 So. 130; *Richmond & D. R. Co. v. Farmer*, 97 Ala. 141, 12 So. 86. Proof of negligence of a carrier is not a fatal variance from a declaration averring wilful disregard of the duties to the public

concerning which the carrier was negligent. *Alabama & V. R. Co. v. Hanes*, 69 Miss. 160, 13 So. 246.

**30.** *Comerford v. West End St. R. Co.*, 164 Mass. 13, 41 N. E. 59.

**31.** *Highland Ave. & B. R. Co. v. Maddox*, 100 Ala. 618, 13 So. 615. But where it was alleged that an injury to plaintiff by being struck by a street car occurred at a crossing at a particular street, and the evidence showed that the child was injured at a point perhaps forty feet from such street, the variance was immaterial, no objection having been interposed to the evidence and the defendant having made no claim of surprise. *San Antonio Traction Co. v. Court*, (Tex.) 71 S. W. 777.

**32.** *Hoes v. Third Ave. R. Co.*, 5 App. Div. (N. Y.) 151, 39 N. Y. Supp. 40.

claimed he was injured, is admissible, though the acts are not set out in detail the petition.<sup>33</sup> Where, in an action by a passenger for injuries sustained by reason of the derailment of the train, defendant admitted the derailment and the establishment of a *prima facie* case of negligence, the allegations of the complaint as to the manner and cause of the accident became immaterial, defendant being liable unless able to show that the derailment was not caused by any act of negligence on his part.<sup>34</sup> When a petition alleged that defendant negligently ran its cars at a speed of eighteen to twenty miles an hour, and in excess of the speed permitted by an ordinance, which was duly set out; that it negligently omitted to stop its car or give warning, and "by reason of said negligence of the defendant" plaintiff was injured, etc., recovery could be based either on the company's negligence in failing to stop the car or in running at an excessive rate of speed.<sup>35</sup> Evidence that fire trucks and engines on the way to fires have the right of way at street crossings, due to local custom, is inadmissible where such custom has not been pleaded.<sup>36</sup> Under a statute empowering the trial court to conform the pleadings of the facts proved where the amendment does not substantially change the claim or defense, the fact that plaintiff, suing a street railroad company for injuries, alleges that the stage of which plaintiff was a passenger was upon a public highway over which defendant's tracks were laid, while on the trial defendant proves ownership in fee of the premises where the accident occurred, is immaterial, as, for the purpose of sustaining the judgment, the complaint will, on appeal, be deemed to have been amended in harmony with the proof.<sup>37</sup>

**§ 485. Admissibility of ordinances and statutes.** — An ordinance prohibiting any person not a regular employee from jumping on

**33.** *Central of Ga. Ry. Co. v. McKinney*, 116 Ga. 13, 42 S. E. 229.

**34.** *McNeill v. Durham & C. R. Co.*, 130 N. Car. 256. 41 S. E. 383.

**35.** *San Antonio Traction Co. v. Upton*, (Tex. Civ. App.) 71 S. W. 565.

**36.** *Knox v. North Jersey St. Ry. Co.*, 2 St. Ry. Rep. 732, 70 N. J. L. 347, 57 Atl. 423.

**37.** *Liekens v. Staten Isl. M. R. Co.*, 64 App. Div. (N. Y.) 327, 72 N. Y. Supp. 162.

or off a street car has been held admissible in evidence on the issue of the plaintiff's contributory negligence in jumping off from a car while in motion.<sup>38</sup> Where a passenger claimed that she was thrown to the ground by a sudden jerk of a car as she was stepping down from the rear platform and the defense was that she had attempted to alight from a moving car, the admission in evidence of an ordinance providing that "conductors shall not allow ladies or children to leave or enter cars while the same are in motion," was held to be proper.<sup>39</sup> Where a passenger is injured through a defect in a street pavement while passing from the car to the sidewalk, an ordinance requiring street railway companies to keep in repair, to the satisfaction of the city authorities, a space between lines one foot outside of their outer rails, under a penalty, is admissible in evidence in an action against the company.<sup>40</sup> Where a railroad law requires a street railroad corporation to keep in permanent repair the portion of the streets between its tracks and two feet in width outside of its tracks under the supervision of the proper local authorities, and whenever required by them to do so, and in such manner as they may prescribe, and a city charter authorizes the mayor and common council to regulate and repair highways and streets, and empowers the council to repair pavements, and assess abutting property owners therefor, a resolution of the council approved by the mayor, empowering a paving company to take up the pavement laid by a street railroad company, and repave the street and keep it in repair in accordance with the city's specifications, is admissible in evidence in an action against the railroad company for injuries sustained by a passenger in stepping into a hole in the pavement on alighting from its cars, as showing that the company was relieved from the obligation of keeping in repair such portion of the street.<sup>41</sup> Where a person was killed in a

**38.** *Denison & Sherman Ry. Co. v. Carter*, 98 Tex. 196, 3 St. Ry. Rep. 833, 82 S. W. 782.

**39.** *McHugh v. St. Louis Transit Co.*, 190 Mo. 85, 4 St. Ry. Rep. 647, 88 S. W. 853.

**40.** *Fielders v. North Jersey St. Ry. Co.*, 67 N. J. L. 76, 50 Atl. 533.

**41.** *Welch v. Syracuse R. T. R. Co.*, 70 App. Div. (N. Y.) 362, 75 N. Y. Supp. 173, and was admissible on the question of the street railroad

collision between the vehicle in which he was riding and a trolley car, in an action to recover for his death, city ordinances regulating the control and management of cars in the city streets were held to be properly admissible in evidence as bearing on the conduct of plaintiff's intestate, and that as he had a right to expect that the company would observe the requirements of the ordinance, his reliance on that expectation was not contributory negligence.<sup>42</sup> Where a street railway company was running its

company's negligence, though it were not relieved of its obligation to keep the street in repair by the city's action. See also *Atlanta Consol. St. R. Co. v. Foster*, 108 Ga. 223, 33 S. E. 886. In an action to recover for injuries sustained in being thrown from a street car, a city ordinance requiring street cars to stop before crossing the track of any other company is admissible in evidence, where, shortly before plaintiff was thrown from the car, it had crossed the track of another company without stopping. *Macon Consol. St. R. Co. v. Barnes*, 113 Ga. 212, 38 S. E. 756.

**A city ordinance fixing the rate of speed** permissible for steam cars, vehicles drawn by horses, and horses ridden by persons, is irrelevant when offered so that a jury might infer therefrom what would be a reasonable rate of speed for an electric car. *Maxwell v. Wilmington City R. Co.*, 1 Marv. (Del.) 199, 40 Atl. 945. Where, in an action against a street railway company for injury to a passenger, who was knocked off the running-board of a car by a bridge girder, the petition alleged negligence in running at excessive and unlawful speed, in violation of a certain ordinance, such ordinance was relevant to the issue, and properly admitted in evidence. *San Antonio Traction*

*Co. v. Bryant*, (Tex. Civ. App.) 70 S. W. 1015. Where, in an action for injuries by collision with a street car, there is no evidence as to the speed at which the car was moving, an ordinance regulating the speed of electric street cars is immaterial. *Mathieson v. Omaha St. Ry. Co.*, (Nebr.) 92 N. W. 639. In actions against street car companies for personal injuries, the plaintiff may not only show what was required of the company by the ordinances of the city, but what was its usual practice in running its cars in the street where he was injured, and thus to show by its conduct what he had reason to expect would be its practice in regard to headlights and warnings. *Canfield v. North Chicago St. R. Co.*, 98 Ill. App. 1. Where plaintiff contended that the car stopped on the crossing, and defendant that it passed over before stopping, ordinances and police regulations forbidding cars to be stopped on the crossing are admissible to show the greater probability of defendant's contention. *Stiasny v. Met. St. Ry. Co.*, 172 N. Y. 656, 65 N. E. 1122; affg. 68 N. Y. Supp. 694, 58 App. Div. (N. Y.) 172; *Maisels v. Dry Dock, etc. St. Ry. Co.*, 16 App. Div. (N. Y.) 391, 45 N. Y. Supp. 4.

<sup>42</sup> *Oates v. Union R. Co.*, 27 R. I. 499, 4 St. Ry. Rep. 981, 63 Atl. 675.

cars in excess of the speed allowed by the statutes and valid municipal ordinances, such fact is competent evidence in an action by a traveler on the highway, injured by the cars, though the statute simply imposes a penalty for its violation.<sup>43</sup> Where a plaintiff, without objection, introduced an amendment to an ordinance with reference to regulation of speed of cars, in an action for injuries caused by a collision with a pedestrian, the original not being put in evidence, while it might have been more formal to have introduced the original ordinance, there was no reversible error where the amended ordinance was intended to, and did of itself, regulate the speed of street cars within the city.<sup>44</sup> In an action for the death of a member of a fire department, caused by collision between a street car and a hose wagon, it was held proper to allow the plaintiff to introduce in evidence a city ordinance providing that the apparatus of the fire department should have the right of way over city streets.<sup>45</sup>

§ 486. **Opinion evidence as to rate of speed.** — Opinions of witnesses, not experts, are ordinarily inadmissible. This rule applies to all questions, where the facts are susceptible of actual

**43.** *Norfolk Ry. & L. Co. v. Corletto*, 100 Va. 355, 41 S. E. 740. Where it is specifically alleged that the speed of a car was in excess of that prescribed by ordinance, such ordinance is competent evidence to prove that the speed was excessive. *San Antonio Traction Co. v. Upson*, 31 Tex. Civ. App. 50, 71 S. W. 565. Where there was no evidence that plaintiff, injured by a collision, drove on the track at a rate in violation of the city ordinance as to fast driving, there was no error in excluding the ordinance. *Wosika v. St. Paul City Ry. Co.*, 80 Minn. 364, 83 N. W. 386. Evidence that defendant was acting in violation of a statute or ordinance regulating the mode of conducting vehicles is admissible as tending to

show negligence, where but for such act the collision would not have occurred. *Harrison v. Sutter St. R. Co.*, 116 Cal. 156, 57 Pac. 1019.

**An ordinance requiring motormen** on an electric street car to keep a vigilant watch for carriages and govern themselves accordingly, to avoid damages, is inadmissible under a declaration describing it as requiring a street car company, in case its servants saw horses approaching and they appeared to be frightened, to stop the cars and allow the horses to pass. *Kankakee Elec. R. Co. v. Lade*, 56 Ill. App. 454.

**44.** *Knoxville Traction Co. v. Brown*, 115 Tenn. 323, 4 St. Ry. Rep. 1005, 89 S. W. 319

**45.** *McBride v. Des Moines City*

statement. Where they are not, and the resort must be had to opinions, such opinions can only be given in evidence by experts. The rate of speed at which a motor car is running, which is not actually measured, can be given only by the opinions of witnesses; and such opinions only are allowable when given by persons peculiarly skilled on the question upon which they are called to give evidence. Witnesses not shown to have any special experience in determining the rate of speed at which a motor was running at the time of the injury are not competent to give opinions on that subject.<sup>46</sup> A witness, however, who is not an expert, may testify whether a trolley car was running fast or slow at the time of an accident, as this is a matter of common observation.<sup>47</sup> And it has been decided that in an action for injuries, caused by a collision between a street car and a vehicle, plaintiff, who was riding in the vehicle, was competent to testify to what he saw as to the rate of speed at which the car was running, and not as an expert, and the admission of his testimony not ground for a reversal of the judgment.<sup>48</sup> The rate of speed of a railroad train is not purely within the knowledge of experts, and not, therefore, the subject of expert testimony; and while a witness, to give testimony upon that subject, must have some knowledge or experience upon the same, he is not required to have the degree of knowledge peculiar to experts called upon to testify when expert testimony is required, and give opinions based upon hypothetical questions.<sup>49</sup> And it is said that it is now well-settled law

Ry. Co., 134 Iowa 398, 109 N. W. 618. Compare Birmingham Ry. & Elec. Co. v. Baker, 126 Ala. 135, 28 So. 87.

**46.** *Francisco v. Troy & L. R. Co.*, 78 Hun (N. Y.) 13, 29 N. Y. Supp. 247, 60 St. Rep. (N. Y.) 797. The speed at which a street car was going at a given time is not a question of expert testimony, but any witness who saw it may state his opinion as to its speed; the weight to be given such opinion being a matter for the jury to determine in view of his ex-

perience and the other facts shown. *Robinson v. Louisville R. Co.*, (U. S. C. C. A., Ky.) 50 C. C. A. 357, 112 Fed. 484.

**47.** *Ehrman v. Nassau Elec. R. Co.*, 23 App. Div. (N. Y.) 21, 48 N. Y. Supp. 379.

**48.** *Sluder v. St. Louis Transit Co.*, 189 Mo. 107, 4 St. Ry. Rep. 581, 88 S. W. 648.

**49.** *Sculley v. N. Y., L. E. & W. R. Co.*, 80 Hun (N. Y.) 197, 30 N. Y. Supp. 61; *Northrup v. New York,*

that such a common, every-day matter as the speed of a street railroad car, with which people who generally are possessed of knowledge of time and distance are familiar, is not essentially one for expert opinion. Such opinion in no sense involves a question of science. It is one upon which one man who is possessed of the usual knowledge of time and distance may determine quite as well as another. While it is no doubt true the experience and capacity of the witness on such matters are proper for the consideration of the jury as tending to affect the weight or value of the testimony, such matters certainly do not go to the question of its competency.<sup>50</sup> But again it is decided that witnesses who testify to the ordinary speed of street cars must be properly qualified by showing their familiarity with the ordinary speed on that route and at the place in question.<sup>51</sup> But a witness cannot testify that he saw a car "coming down at a terrible speed," as

etc., R. Co., 37 Hun (N. Y.) 299; *Salter v. Utica & B. R. Co.*, 59 N. Y. 632; *Chipman v. Union Pac. R. Co.*, 12 Utah 68, 41 Pac. 562; *St. Louis & S. F. R. Co. v. Brown*, 62 Ark. 254, 35 S. W. 225; *Chicago, B. & Q. R. Co. v. Gunderson*, 174 Ill. 495, 51 N. E. 708; *Galveston, etc., R. Co. v. Sullivan*, (Tex. Civ. App.) 42 S. W. 568.

**An answer to the following hypothetical question** was held to be properly excluded: "Now you have heard the testimony here relative to this collision and the position of the car and wagon immediately after, as the result of the collision, and I ask you, taking that state of facts that has been testified to in your hearing upon these points, and your knowledge of the conditions that existed there, the weight of the car and so on, at what rate of speed in your judgment was that car going at the time of the collision?" As to this the court said: "The witness did not see the accident. The ques-

tion does not assume he heard all the testimony. It does not appear what part of the testimony he did hear, nor does it appear that he had knowledge of the weight of the car, its momentum, or of the weight of the load which was struck. We do not think it was error to exclude the answer." *La Londe v. Transit St. Mary's Tract. Co.*, 145 Mich. 77, 4 St. Ry. Rep. 521, 108 N. W. 365.

**50.** *Hall v. St. Louis & S. Ry. Co.*, 124 Mo. App. 661, 6 St. Ry. Rep. 831, 101 S. W. 1137; *citing Walsh v. Mo. Pac. R. Co.*, 102 Mo. 582, 14 S. W. 873, 15 S. W. 757; *Aston v. Transit Co.*, 2 St. Ry. Rep. 631, 105 Mo. App. 226, 79 S. W. 999; *Muth v. St. L. & M. R. R. Co.*, 87 Mo. App. 422. See *Goodes v. Lansing & Suburban Trac-tion Co.*, 150 Mich. 494, 6 St. Ry. Rep. 831, 114 N. W. 338.

**51.** *Verrone v. Rhode Island Sub-urban Ry. Co.*, 27 R. I. 974, 4 St. Ry. Rep. 974, 62 Atl. 512.

it conveys to the jury no measurement of the rate of speed, except that it was at such a rate that the witness disapproved.<sup>52</sup> A person of ordinary experience is competent to testify as to the rate at which a railroad train was running.<sup>53</sup> Persons who have been accustomed to riding upon a street car line, where it has been shown that the schedule and statutory rate of speed of the cars is the same, may testify that the car was running very fast and at an unusual rate of speed, for the purpose of showing that it was going at a prohibited rate of speed. The fact that witness was a passenger on a street car, rather than a bystander, does not disqualify him to testify as to the proximate speed at which the car was running, where it was shown that he had been accustomed to riding on the line, and knew what the usual rate of speed was.<sup>54</sup> And in an action for an injury to plaintiff alleged to have been caused by defendant's negligence in suddenly starting the car, as she was preparing to alight, evidence by her and her witnesses as to the speed at which the car started was held to be admissible as a statement of a fact and not the expression of a mere opinion.<sup>55</sup> A boy who has testified that he has timed himself while walking and ascertained the rate at which he could walk may express an opinion as to the rate of speed of an electric car when he observed it.<sup>56</sup> A witness who once timed the running of electric cars on a road other than the one in question, and has noticed the speed of steam cars and of trotting and running horses, and known the rate of speed at which they have been going, and has made calculations of the speed, may express an opinion as to the speed at which a car which he observed was running.<sup>57</sup> A witness who has driven wagons for twenty years,

**52.** *Chicago City Ry. Co. v. Wall*, 93 Ill. App. 411.

**53.** *Waldele v. N. Y. Cent. & H. R. Co.*, 4 App. Div. (N. Y.) 549, 38 N. Y. Supp. 1009.

**54.** *Johnson v. Oakland, etc., Ry. Co.*, 127 Cal. 608, 60 Pac. 170.

**55.** *Chicago City Ry. Co. v. Bundy*, 210 Ill. 39, 3 St. Ry. Rep. 126, 71 N. E. 28.

**56.** *Penny v. Rochester R. Co.*, 7 App. Div. (N. Y.) 595, 40 N. Y. Supp. 172, 74 St. Rep. (N. Y.) 732.

**57.** *Strauss v. Newburg Elec. R. Co.*, 6 App. Div. (N. Y.) 264, 39 N. Y. Supp. 998. Failure of a witness who testifies to the speed at which an electric car was going to qualify on such point is cured by testimony on his cross-examination in response

and who testifies that he is familiar with the speed of wagons, is competent to testify as to the rate of speed at which a street car was running at a particular time, and which he had a chance to observe.<sup>58</sup> In an action against a street car company for damages occasioned by a car colliding with plaintiff's wagon, witnesses who based their opinion on a comparison of the speed of the car at the time of the accident with its speed on other days were competent to testify as to its speed at the time of the collision.<sup>59</sup> Plaintiff, who was injured at a street crossing, may testify as to the speed of the car without being an expert, since the rate of speed of moving cars may be shown by any witness who saw them in motion, and does not involve a question of science requiring expert knowledge.<sup>60</sup> Where the speed of a street car causing an injury is called in question, the opinions of persons observing the movements of the car are competent as relating to a matter of common knowledge, and especially where such persons appear to have made observations of the movement of similar cars.<sup>61</sup> A witness need not be an expert in order to give his

to questions put to him that he had ridden many times on the car and timed it to see how fast it was going. *Kitay v. Brooklyn, etc., R. Co.*, 23 App. Div. (N. Y.) 228, 48 N. Y. Supp. 982.

**It is not erroneous** to permit a witness qualified to do so to illustrate the speed of a car by reference to the speed of a trotting team and buggy. *City R. Co. v. Wiggins*, (Tex. Civ. App.) 52 S. W. 577. Plaintiff in an action for personal injuries caused by a collision between his car and defendant's wagon may be asked by his counsel whether he thinks he is safe in saying that the speed of his car did not exceed a specified rate, as to which he has testified. *Price v. Charles Warner Co.*, 1 Penn. (Del.) 462, 42 Atl. 699.

**58.** *Garduhn v. Union Ry. Co.*, 50

App. Div. (N. Y.) 602, 64 N. Y. Supp. 210.

**59.** *Mertz v. Detroit Elec. Ry. Co.*, 7 Detroit Leg. N. 393, 125 Mich. 11, 83 N. W. 1036.

**60.** *Covell v. Wabash R. Co.*, 82 Mo. App. 180. A witness may, without qualifying by showing special experience, give his opinion relative to the rate of speed of the car. *West Chicago St. Ry. Co. v. Dedloff*, 92 Ill. App. 547.

**But a witness who has had no experience** in operating cars, has traveled little on them, and has paid no attention to the speed at which they were ordinarily run, cannot give his opinion as to the speed at which a car was running at the time of an accident. *Muth v. St. Louis & M. R. Co.*, 87 Mo. App. 422.

**61.** *Toledo Elec. St. Ry. Co. v.*

opinion as to the speed of a street car; but he must be shown to have had, and to have availed himself of, an opportunity for observation in the case in hand.<sup>62</sup> Where a witness had stated that she knew when cars were running at full speed and when they were not, she could be asked whether the car which struck deceased was or was not at the time running at full speed; the weight of evidence being for the jury.<sup>63</sup> A witness who watched the approach of the car and saw the collision between it and plaintiff's wagon may testify as to the apparent speed of the car.<sup>64</sup>

**§ 487. Opinion evidence to show time and distance within which vehicles may be stopped.**—The length of time or the distance within which a street car or other vehicle going at a designated rate of speed may be stopped, by proper efforts on the part of those having the management or control thereof at the time and place and under the circumstances attending any particular case, is a matter of science or skill upon which opinion evidence of witnesses, duly qualified by their own experience and observation, is admissible in actions for personal injuries, where failure to stop the car or other vehicle within a reasonable time or space in order to prevent an accident is charged.<sup>65</sup> So it has been

Westenhuber, 22 Ohio C. C. 67, 12 Ohio C. D. 22. Evidence that an electric car which injured the plaintiff was "going as fast as it could" is beyond the realm of common observation and is incompetent. *Pfeffer v. Chicago City Ry. Co.*, 96 Ill. App. 10.

**62.** *Mathieson v. Omaha St. Ry. Co.*, (Neb.) 92 N. W. 639.

**63.** *Potter v. O'Donnell*, 199 Ill. 119, 64 N. E. 1026.

**64.** *Eckington, etc., R. Co. v. Hunter*, 23 Wash. L. Rep. (D. C.) 401.

**65.** *Indianapolis St. Ry. Co. v. Slifer*, (Ind. App.) 3 St. Ry. Rep. 225, 72 N. E. 1055; *Watson v. Minneapolis St. R. Co.*, 53 Minn. 551, 55

N. W. 742, one who has been a conductor on an electric street car for two months is competent to testify within what distance such a car, going at a specified rate of speed, can be stopped. *Mantel v. Chicago, M. & St. P. R. Co.*, 33 Minn. 62, 21 N. W. 853; *Brown v. Rosedale St. Ry. Co.*, (Tex.) 15 S. W. 120; *O'Neil v. Dry Dock, etc., R. Co.*, 129 N. Y. 125, 29 N. E. 84, 15 N. Y. Supp. 84, holding that evidence by a driver of experience stating the distance within which, under given circumstances, a one-horse vehicle can be stopped is competent, but its admission is not to be encouraged. *McDermott v. Third Ave. R. Co.*, 44 Hun (N. Y.) 107,

decided that one who was shown to have been in the employ of defendant street railway company for over a year was properly qualified to testify as to the distance within which a car could be stopped going at a certain rate of speed, but where the hypothetical question put to him was restrictive in that it asked him in what distance a car containing specified passengers could be stopped, it was held improper to receive his answer.<sup>66</sup> Where a witness is qualified to testify as an expert as to the operation of cars, he is properly allowed to testify as to the distance at which a car could be stopped running at the speed of the car in question. It is, however, decided that he is not entitled to testify that the motorman "seemed to try to stop the car as quick as he could" but should be required to state the facts as to what the motorman did to stop the car.<sup>67</sup> In another action, however, for personal injuries caused by the collision of a street car with plaintiff's buggy, it was held not to be an abuse of discretion for the court to refuse to allow a witness, who saw the accident, and who showed by his testimony some familiarity with the stopping of street cars, to testify that the motorman stopped the car as soon as it could be stopped at the time and place.<sup>68</sup> A master mechanic who never drove a car is incompetent, without further proof, to testify as an expert as to the distance within which a car can be stopped.<sup>69</sup> One who has had no experience in operat-

holding that it is competent to ask a person who standing on the front platform of the car at the time of the injury, as to whether, at the distance at which the injured person was standing at the time he was first warned of the approach of the car, the car would have passed without injuring him.

**But opinions of persons who have been street car drivers,** but who have no personal knowledge as to the brakes on a certain car, and have never run a car down a certain incline, are inadmissible to show that the car might have been stopped on

such incline had the brakes been in good order. *Geist v. Detroit City R. Co.*, 91 Mich. 446, 51 N. W. 1112.

**66.** *Heinzle v. Metropolitan St. Ry. Co.*, 182 Mo. 528, 3 St. Ry. Rep. 521, 81 S. W. 848.

**67.** *Birmingham Ry., L. & P. Co. v. Randle*, (Ala.) 5 St. Ry. Rep. 19 43 So. 355.

**68.** *Dallas Consol. Elec. St. Ry. Co. v. English*, 42 Tex. Civ. App. 393, 4 St. Ry. Rep. 1013, 93 S. W. 1096.

**69.** *Barry v. Second Ave. R. Co.*, 1 Misc. Rep. (N. Y.) 502, 20 N. Y. Supp. 871, 49 St. Rep. (N. Y.) 705.

ing railroad trains of any kind is not qualified to give an opinion as to the distance in which a cable car can be stopped, although he has often seen them stopped.<sup>70</sup> A witness may testify that he has seen cable cars which were running at the usual rate of speed stop within twenty or thirty feet.<sup>71</sup> An experienced motorman may be asked within what distance he can stop an electric car running at a specified rate of speed.<sup>72</sup> A motorman, not shown to be an expert, and who had had but a momentary experience with a reverse current, under different and special conditions, is not competent to testify that a car going ten miles an hour ought to be stopped immediately by the use of the reverse power.<sup>73</sup> But one who has worked as a motorman for about a year, is familiar with the locality of an accident, was there shortly after it happened and examined the track, and has had occasion to frequently stop his car suddenly, is competent to testify as an expert within what distance the car could have been stopped at such point when running at a designated speed.<sup>74</sup> So a motorman who ran the same car over the route where the accident occurred was held competent to testify as to the running of the car, and as to how and within what distance it could be stopped where it appeared that the same power and appliances for operat-

**70.** *Mammerburg v. Met. St. R. Co.*, 62 Mo. App. 562, 1 Mo. App. Rep. 578.

**71.** *Chicago City R. Co. v. Taylor*, 170 Ill. 49, 48 N. E. 831, 9 Am. & Eng. R. Cas. N. S. 513, affg. 68 Ill. App. 613.

**72.** *Atlantic Coast Elec. R. Co. v. Rennard*, 62 N. J. L. 773, 42 Atl. 1041, 6 Am. Neg. Rep. 125.

**73.** *Bliss v. United Traction Co.*, 75 App. Div. (N. Y.) 235, 78 N. Y. Supp. 18.

**74.** *Tholen v. Brooklyn City R. Co.*, 10 Misc. Rep. (N. Y.) 283, 63 St. Rep. (N. Y.) 269, 30 N. Y. Supp. 1081, 1085. The opinion of a conductor is admissible as to the distance of an electric car from one standing

upon the track when the motorman halloed, although he did not see the person until the car had run for some distance, where he knew the speed of the car and the space it would pass over in a given period of time, *Riley v. Salt Lake R. T. Co.*, 10 Utah 428, 37 Pac. 681.

**The question of the time necessary** for a four-horse truck to travel a given distance is not the subject for expert testimony, *Meyer v. Brooklyn City R. Co.*, 10 Misc. Rep. (N. Y.) 11, 62 St. Rep. (N. Y.) 649, 30 N. Y. Supp. 534; or whether or not it could have crossed a street car track at a certain point without colliding with an approaching car, *Id.*

ing the car were in use when he ran it.<sup>75</sup> In examining an expert witness as to the time and space within which a street car can be stopped, a hypothetical question is objectionable where it does not cover the exact condition of the street and track in question, nor describe the equipment provided for stopping the car.<sup>76</sup> But error in permitting an expert witness to answer a defective hypothetical question as to the time and space within which a street car could be stopped was held to be harmless where the testimony of defendant's witnesses placed the distance within which the car could have been stopped at only five feet more than testified to by the expert.<sup>77</sup> The defect in a hypothetical question propounded to a motorman who appears as an expert witness, requiring him to say within what distance he could have stopped a car, running at the rate of speed of the car which caused the accident, being objected to because of its personal nature, and because it did not ask within what space a man of ordinary strength and skill could have stopped the car, is cured by the answer of the witness, which ignores the personal character of the question, and answers it from the standpoint of an expert.<sup>78</sup> The question as to whether a car operated at a certain rate of speed can be stopped within a certain distance is a question of fact to be determined by the jury;<sup>79</sup> and where the evidence showed that a car going at a speed of five miles an hour could have been stopped within thirty feet, but that it ran 100 feet from the point of collision before stopping, the negligence of the motorman in failing to stop the car after the collision was actionable, although the child run over may have contributed by his negligence to the original accident.<sup>80</sup> So, when plaintiff was struck

**75.** *South Covington & Cin. St. Ry. Co. v. Weber*, 26 Ky. Law Rep. 922, 3 St. Ry. Rep. 292, 82 S. W. 986.

**76.** *Impkamp v. St. Louis Transit Co.*, 108 Mo. App. 655, 3 St. Ry. Rep. 577, 84 S. W. 119.

**77.** *Impkamp v. St. Louis Transit Co.*, 108 Mo. App. 655, 3 St. Ry. Rep. 577, 84 S. W. 119.

**78.** *Schafstette v. St. Louis & M.*

*R. Co.*, 1 St. Ry. Rep. 434, and notes, 175 Mo. 142, 74 S. W. 826.

**79.** *Kotila v. Houghton Co. St. Ry. Co.*, 134 Mich. 314, 96 N. W. 437, 1 St. Ry. Rep. 397, and notes; *Citizens' St. R. Co. v. Hamer*, 29 Ind. App. 426, 62 N. E. 658.

**80.** *Citizens' St. R. Co. v. Hamer*, *supra*.

by a car of the defendant company because of his own contributory negligence, and before he was run over by the car, his body was resting on the fender of the car; the car traveled a distance of nearly one hundred feet before it was stopped, although it could have been stopped within twenty-five or thirty feet, and by reason of the jolting of the car in its progress the plaintiff was thrown from the fender and run over, the evidence was sufficient to sustain a recovery.<sup>81</sup> Under the circumstances existing in a particular case the knowledge of an expert may not be required to demonstrate within what distance a car could have been stopped.<sup>82</sup>

§ 488. **Expert and opinion evidence further considered.** — Expert testimony as to what would have been the effect upon plaintiff's arm if the wheels of a street car had run over it is properly excluded where plaintiff does not claim that the wheels ran over his arm, but that they caught and crushed his elbow.<sup>83</sup> But although an expert may be permitted to testify as to the adequacy and suitability of a given style of brake for use in a given manner, yet where the question is whether or not a master has used reasonable care to furnish a reasonably safe and suitable brake, it is error to permit an expert to testify that the brake in question could not be uniformly relied upon.<sup>84</sup> The question whether a fender properly

**81.** *Green v. Met. St. Ry. Co.*, 65 App. Div. (N. Y.) 54, 72 N. Y. Supp. 524, reversed on appeal on another question, 171 N. Y. 201, 63 N. E. 958.

**See also on question of distance and time within which car can be stopped:** *Boetcher v. Detroit Citizens' St. Ry. Co.*, 131 Mich. 295, 91 N. W. 125, 9 Detroit Leg. N. 120; *Fenner v. Wilkes-Barre & W. V. Traction Co.*, 202 Pa. St. 365, 51 Atl. 1034; *Henderson v. United Traction Co.*, 202 Pa. St. 527, 51 Atl. 1027; *Barry v. Burlington Ry. & L. Co.*, 119 Iowa 62, 93 N. W. 68, 95 N. W. 229; *Blum v. Met. St. Ry. Co.*, 79 App. Div. (N. Y.) 611, 80 N. Y. Supp. 157; *Davidson v. Met.*

*St. Ry. Co.*, 75 App. Div. (N. Y.) 426, 78 N. Y. Supp. 352; *Ferri v. Union R. Co.*, 77 App. Div. (N. Y.) 301, 79 N. Y. Supp. 230; *Sesselman v. Met. St. Ry. Co.*, 76 App. Div. (N. Y.) 336, 78 N. Y. Supp. 482; *Wagner v. Met. St. Ry. Co.*, 79 App. Div. (N. Y.) 591, 80 N. Y. Supp. 191.

**82.** *Richmond v. Metropolitan St. Ry. Co.*, 123 Mo. App. 495, 5 St. Ry. Rep. 688, 100 S. W. 54; *Wise v. St. Louis Transit Co.*, 198 Mo. 546, 5 St. Ry. Rep. 611, 95 S. W. 898.

**83.** *McCoy v. Milwaukee St. R. Co.*, 88 Wis. 56, 59 N. W. 453.

**84.** *Regan v. Brooklyn Heights R. Co.*, 115 App. Div. (N. Y.) 705, 6 St. Ry. Rep. 849, 101 N. Y. Supp. 213.

lowered would have passed over a child lying on the track is one for the jury to determine, and is not a matter susceptible of expert testimony.<sup>85</sup> In an action by a street car conductor to recover for injuries resulting from a derailment, in which evidence was introduced tending to show that at the time of the accident the car was running around a curve at a speed of seven or eight miles an hour; that the rails were spread slightly at that point, and that the right forward wheel was worn and the flange thereon chipped, it was held error to permit experts to testify that in their opinion, the derailment was caused by the track being out of gauge, and the flange of the forward wheel not being in proper condition, as the cause of the derailment was for the jury to determine and the case did not warrant the introduction of opinion evidence.<sup>86</sup> In an action by an employee to recover for injuries received while working on defendant's elevated railway structure, it was held, that the court erred in permitting defendant's foreman, who was superintending the work, and who was an expert, to give an opinion as to whether placing red flags at either end of a gang of men at work on the tracks, would make the place a safe place in which to work.<sup>87</sup> In an action to recover for the death of a party resulting from collision with a street car, it was held, that testimony of eye witnesses that the decedent was a careful and cautious man was inadmissible.<sup>88</sup> The testimony of experienced persons as to the efficiency of a certain kind of insulators used to prevent hot span wires as well as to their tendency to fall into disuse in places where formerly used, has been held admissible.<sup>89</sup>

**§ 489. Admissibility of declarations or admissions of street railway employees generally.** — Where the acts of employees or serv-

**85.** *Cincinnati Traction Co. v. Wooley*, 5 St. Ry. Rep. 806.

**86.** *Schutz v. Union Railway Co.*, 181 N. Y. 33, 3 St. Ry. Rep. 659, 73 N. E. 491.

**87.** *McLaughlin v. Manhattan Ry. Co.*, 111 App. Div. (N. Y.) 254, 4 St. Ry. Rep. 838, 97 N. Y. Supp. 719.

**88.** *Spiking v. Consolidated Ry. & P. Co.*, 33 Utah 313, 6 St. Ry. Rep. 320, 93 Pac. 838.

**89.** *Warren v. City Electric Railway Co.*, 141 Mich. 298, 4 St. Ry. Rep. 487, 104 N. W. 613.

ants will bind the street railway company, the declarations or admissions of such employees or servants will also bind the company, if it affirmatively appear that they were made at the time of the injury to the plaintiff and constituted a part of the *res gestæ*.<sup>90</sup> But declarations or admissions made subsequently to the time of the injury are not part of the *res gestæ*, and are not admissible in evidence against the railway company.<sup>91</sup> The *res*

**90.** Springfield Consol. Ry. Co. v. Welsh, 155 Ill. 511, 40 N. E. 1034, a declaration by the motorman running an electric car, made while the car was still on the body of one it had run down, that the reason he did not stop was that he could not reverse the car, is admissible in evidence as part of the *res gestæ*; Sample v. Consol. L. & Ry. Co., 50 W. Va. 472 (W. Va. Sup. Ct. App.) 24 Am. & Eng. R. Cas. N. S. 380, 40 S. E. 597, a declaration by the motorman of an electric car, made while the car was still on the body of the person injured, that "I saw the child but thought I could pass it;" or "This is a terrible thing, I saw the child but thought I could run past it," is admissible as part of the *res gestæ* in an action for the injury. See also upon the general question of the admissibility of declarations constituting part of the *res gestæ*. Joslin v. Grand Rapids, etc., Co., 53 Mich. 322, 19 N. W. 17; Vicksburg & M. R. Co. v. O'Brien, 119 U. S. 99, 30 L. ed. 299, 7 S. Ct. 118; Union Ins. Co. v. Smith, 124 U. S. 424, 31 L. ed. 505, 8 Sup. Ct. Rep. 544; Pierce v. Van Dusen, 78 Fed. 706, 47 U. S. App. 339; Emerson v. Burnett, 11 Colo. App. 88, 52 Pac. 753; First Nat. Bank v. North, 6 Dak. 141, 41 N. W. 738; Cherokee, etc., Coal Co. v. Dixon, 55 Kan. 70, 39 Pac. 694; Geary v. Stephenson, 169 Mass. 31, 47 N. E. 509; Idaho, etc.,

Co. v. Firemans' Fund Ins. Co., 8 Utah 46, 29 Pac. 827, 17 L. R. A. 588; Hall v. Murdock, 119 Mich. 392, 78 N. W. 330; Bergeman v. Indiana, etc., Ry., 104 Mo. 86, 15 S. W. 994; Short v. Northern Pac. R. Co., 1 N. Dak. 164, 45 N. W. 707.

**Testimony by a witness that when the car struck a cow** killed upon the track of the company, the motorman, while he was getting out of the car, said: "There, that is running without a headlight," is properly admissible as part of the *res gestæ*. Ensley v. Detroit United Ry. Co., 1 St. Ry. Rep. 380, 134 Mich. 195, 96 N. W. 34.

**Statements of an electric motorman** as to whether or not he could have avoided an injury to another, alleged to have been caused by his negligence, are not so remote as to be inadmissible as a part of the *res gestæ*, when made within two minutes after the accident. Coll v. Easton Trans. Co., 180 Pa. St. 618, 37 Atl. 89.

**Report of accident made by conductor of company.**—Requiring production of, see Banks v. Connecticut Ry. & L. Co., 79 Conn. 116, 4 St. Ry. Rep. 120, 64 Atl. 14. *Ex p.* Schoeph, 74 Ohio 1, 4 St. Ry. Rep. 893, 77 N. E. 276.

**91.** Reem v. St. Paul City R. Co., 77 Minn. 503, 80 N. W. 638, 778, in an action by a passenger to recover

*gestæ* in a suit for ejecting a passenger commenced when he paid his fare, and includes all the conversation between himself and the conductor in respect to the payment of his fare while riding on the car, and at the time immediately after he was ejected, and just after he got on the car again.<sup>92</sup>

§ 490. **Declarations or admissions of street railway employees — Instances when admissible.** — Although admissions of liability made by a servant who is not a general agent, or while not engaged

on account of injuries, while the issue was whether the company negligently permitted or caused the street car to be overcrowded, and, if so, whether such overcrowding was the cause of plaintiff's injuries, evidence that the conductor said to the witness when she yelled at him to stop the car, after the injury, "Never mind. Just give me your fare," was not a part of the *res gestæ*, although it may have been contemporaneous in point of time, as it did not illustrate, explain, or characterize the transaction in any degree; *Boone v. Oakland Trans. Co.*, 1 St. Ry. Rep. 14, 139 Cal. 490, 73 Pac. 243, it was error to admit the statement of the conductor to a passenger, made after he had gone to the place where the injured person lay, and again returned to the car, to the effect that "The ladies seem to blame me — seem to think it is my fault," since it was not a part of the *res gestæ*; *Williamson v. Cambridge R. Co.*, 144 Mass. 148, 10 N. E. 790, a remark made to a passenger by the conductor immediately after she fell, while alighting from the car, to the effect that he was very sorry, and that it was his fault, was inadmissible as part of the *res gestæ*, the act of the conductor in ringing the bell and starting the car while plaintiff was leaving it being relied on to prove negligence, and the

words of the conductor not forming a part of that transaction nor in any manner qualifying his act or any act of the plaintiff, and being in form and substance narrative and expressive of an opinion on a past transaction; *Whittaker v. Eighth Ave. R. Co.*, 51 N. Y. 295, the declaration of the employee to be admissible against a street railway company must have been made by him while engaged in the act resulting in the injury complained of; *Waldele v. N. Y. Cent. & H. R. R. Co.*, 95 N. Y. 274, declarations which are merely narrative of a past transaction are not admissible in evidence as part of the *res gestæ*; *Ruschenberg v. Southern El. Ry. Co.*, 161 Mo. 70, 61 S. W. 626, so, of a statement made by the motorman of the car by which plaintiff's intestate was killed, after the accident had happened, and the motorman alighted in the street to help extricate deceased's body from the wheels.

92. *Robinson v. Superior R. T. Ry. Co.*, 94 Wis. 345, 68 N. W. 961, 59 Am. St. Rep. 897, what the conductor said after allowing a passenger to get back in the car, because he was convinced that he had paid his fare, although he had put the passenger off because he thought that he had not paid his fare, is a part of the *res gestæ* of the ejection.

in the performance of his duty, are inadmissible to bind the master, yet evidence that a motorman stated, immediately after an accident, to a passenger, while alighting from the car, that he was under the impression that the plaintiff had previously got off the car, has been held admissible because it tended to contradict him as a witness, and to support plaintiff's contention of being thrown by a sudden jerk of the car, due to the negligence of the motorman.<sup>93</sup> And in an action for damages by reason of a collision of a street car with a vehicle, where the motorman stated to the conductor immediately after the collision, that on account of the wet rails the brakes failed him and caused the accident, such statement was held to be admissible on the ground that it was interwoven so closely with the surrounding circumstances, that a presumption of spontaneity might reasonably arise.<sup>94</sup> In an action to recover for injuries to a pedestrian who was struck by an electric car while walking along the road in company with other men, a statement of the motorman made at the time and place of the accident, in response to a statement by bystanders that he had killed a man, that "Well, I seen the man, I seen his fate and all, and tried to make the stop, but couldn't make it," was admissible as part of the *res gestæ*.<sup>95</sup> Again in an action by a passenger for an assault by a conductor and a porter, where plaintiff testified that after the porter had choked him he said to him, "That's a nice way to treat a passenger here!" and the porter replied, "That is my bread and butter and I will do it again," and that thirty or forty minutes after the assault the conductor and porter continued to assault and abuse him, the evidence of the porter's reply was admissible as part of the *res gestæ*.<sup>96</sup> And in an action by a husband for loss of services of his wife by injuries sustained by being

93. *McDonough v. Boston Elev. Ry. Co.*, 191 Mass. 509, 5 St. Ry. Rep. 375, 78 N. E. 141.

94. *Cincinnati L. & A. Elec. St. Ry. Co. v. Stable*, 37 Ind. App. 539, 4 St. Ry. Rep. 266, 76 N. E. 551, 77 N. E. 363.

95. *Louisville Ry. Co. v. Johnson's*

*Admr.*, 131 Ky. 277, 6 St. Ry. Rep. 706, 115 S. W. 207.

96. *Shaefer v. Missouri Pac. Ry. Co.*, 98 Mo. App. 154, 72 S. W. 154, evidence of a witness that, on going to plaintiff's rescue, the porter stepped back, and another passenger said something to the porter about abus-

struck by the closing of a gate on an elevated car by the train-guard, the expression of the latter, "Go to hell," made in immediate response to an outcry of pain by the wife, is admissible as part of the *res gestæ* to characterize and explain the quality of the act done.<sup>97</sup> In an action by a street railway employee for personal injuries caused by the crushing of his leg between a bank or wall of rock and the side of the motor upon which he was riding with his leg slightly projecting over the edge with the knowledge and approval of the engineer, evidence of what was said between him and the engineer upon his taking his seat, and that the latter told him that it was as safe and comfortable a place as any, is competent evidence on the question of the company's negligence in view of the knowledge of his position.<sup>98</sup> In an action for the death of the motorman on an electric car, occasioned by the "bucking" of the car, due to the condition of the electrical field, evidence as to what defendant's foreman said when the car was reported as bucking is admissible to show notice to such foreman of the defective condition of the car, and that he clearly understood such notice.<sup>99</sup>

**§ 491. Declarations or admissions of street railway employees — Instances when not admissible.** — Where the plaintiff was struck by a street car, and about fifteen minutes was occupied in extricating and caring for him at the place of the accident, when the motorman stated that he saw plaintiff, but thought he would get off the track, the statement was no part of the *res gestæ*.<sup>1</sup> A statement made by the conductor to the motorman of a car imme-

ing plaintiff, and the porter then threatened that passenger that "he would get treated similar if he did not keep his mouth shut," was also admissible as part of the *res gestæ*.

**97.** *Butler v. Manhattan Ry. Co.*, 4 Misc. Rep. (N. Y.) 401, 24 N. Y. Supp. 142, 53 St. Rep. (N. Y.) 644.

**98.** *Denver & B. R. R. T. Co. v. Dwyer*, 20 Colo. 132, 36 Pac. 1106, revg. 3 Colo. App. 408, 33 Pac. 815.

**99.** *Beardsley v. Minneapolis St. R. Co.*, 54 Minn. 504, 56 N. W. 176.

**1.** *Citizens' St. R. Co. v. Howard*, 102 Tenn. 474, 52 S. W. 864; *Williamson v. Railroad Co.*, 144 Mass. 148, 10 N. E. 790; *Adams v. Railroad Co.*, 74 Mo. 553; *Railroad Co. v. O'Brien*, 119 U. S. 99, 7 Sup. Ct. Rep. 118; *Tennis v. Railway Co.*, 45 Kan. 503, 25 Pac. 876; *Railroad Co. v. Stein*, (Ind.) 31 N. E. 180.

diately after an accident, warning him not to make any statement until called upon to make one, is inadmissible, because it does not illustrate or explain how or what caused the accident.<sup>2</sup> A statement made by a conductor, in response to an inquiry of an injured passenger, as he was being carried from the car some time after the accident, to the effect that the car had stopped because a coupling pin had fallen from the car into the slot rail, was held not to be admissible either as part of the *res gestæ* or as the declaration of an agent if prejudicial to the defendant and sufficient ground for reversal.<sup>3</sup> The declaration of the driver of a street car to the officer arresting him, on a trip subsequent to that on which it was claimed he ran into plaintiff's wagon, that he was the man he was looking for, from which it would be inferred that he deemed himself at fault, and was seeking to make a voluntary surrender, is inadmissible.<sup>4</sup> Evidence that the driver of a car stated to the conductor that it was already past the time when he was due at the barn is inadmissible to show that he negligently started his horses forward while a passenger was getting off the car after passing the barns.<sup>5</sup> In an action for injuries to a passenger while boarding a street car, declarations of a transfer agent of the street car company, made two to five minutes after the car had gone, that the conductor would get into trouble and had started without the authority of such agent, are inadmissible as part of the *res gestæ*, since they are not a spontaneous outburst incident to the occurrence or illustrative thereof, but are those of a mere bystander, and, when considered in connection with the fact that such agent ordinarily started the cars himself, should be excluded because of his interest in exculpating himself.<sup>6</sup> Where

2. Louisville Ry. Co. v. Johnson's Admr., 131 Ky. 277, 6 St. Ry. Rep. 706, 115 S. W. 207.

3. Redmon v. Metropolitan St. Ry. Co., 185 Mo. 1, 3 St. Ry. Rep. 505, 84 S. W. 26.

4. Seipp v. Dry Dock, etc., R. Co., 45 App. Div. (N. Y.) 489, 61 N. Y. Supp. 409; Luby v. Hudson R. R. Co., 17 N. Y. 131; Maisels v. Dry Dock,

etc., R. Co., 16 App. Div. (N. Y.) 391; Anderson v. Rome, W. & O. R. Co., 54 N. Y. 334; Little Rock Traction & E. Co. v. Nelson, 66 Ark. 494, 52 S. W. 7.

5. Gardner v. Detroit St. R. Co., 99 Mich. 182, 58 N. W. 49.

6. Metropolitan R. Co. v. Collins, 1 App. D. C. 385, 21 Wash. L. Rep. 811.

it was alleged that the plaintiff was injured in consequence of an inexperienced motorman being placed on the car, and that through overwork and loss of sleep of such motorman the accident ensued it was held that the statement of defendant's superintendent that "he should have known better" than to have placed him on the car was not admissible as part of the *res gestæ* where made long after the occurrence of the collision and some four miles from the place where it occurred.<sup>7</sup> In an action for injuries resulting from a collision between a cab in which plaintiff was riding and a railway car, a conversation with the cab driver after the accident, which is a mere recital of what had occurred, is not admissible as *res gestæ*.<sup>8</sup> Where plaintiff was injured while alighting from defendant's trolley car, and the car was stopped immediately, and the conductor came to her and helped her up, the latter's declaration, in reply to her statement that she had signaled for him to stop, and that he had answered her that he would, "I know I did, but I forgot you. It was entirely my fault" — was not admissible as part of the *res gestæ*.<sup>9</sup>

§ 492. **Declarations as to injuries or suffering.** — Declarations of an injured person, indicative of existing pain or suffering, made at the time of the injury or afterward, are competent evidence in an action to recover for personal injuries, although a narrative of how the injuries were received is not.<sup>10</sup> The fact that parties

7. *Ft. Wayne & Wabash Valley Traction Co. v. Crosbie*, 169 Ind. 281, 5 St. Ry. Rep. 249, 81 N. E. 174.

8. *Springfield Consol. Ry. Co. v. Puntenney*, 101 Ill. App. 95, *affd.*, 65 N. E. 442.

9. *Blackman v. West Jersey & S. R. Co.*, (N. J.) 52 Atl. 370.

10. *Beddle v. City Elec. R. Co.*, 112 Mich. 547, 70 N. W. 1096; *Harris v. Detroit City R. Co.*, 76 Mich. 227, 42 N. W. 1111; *Winter v. Central I. R. Co.*, 74 Iowa 448, 38 N. W. 154, and the statute making a party a competent witness does not abridge

his right to have such declarations introduced in evidence; *Hancock v. Leggett*, 115 Ind. 544, 18 N. E. 53; *Bridge v. Oshkosh*, 71 Wis. 363, 37 N. W. 409; *Block v. Milwaukee St. R. Co.*, 89 Wis. 371, 61 N. W. 1101, 27 L. R. A. 365; *Birmingham Union Ry. Co. v. Hale*, 90 Ala. 8, 8 So. 142, holding that a physician may testify that when he first saw plaintiff after she received the injuries, "she was complaining of pain from the injuries which she said she had received;" *Laughlin v. Grand Rapids St. R. Co.*, 80 Mich. 154, holding that proof of

are now permitted to be witnesses in their own behalf has been held in New York not to have changed the rule of evidence, which made it competent, in actions for personal injuries, for the plaintiff to prove screaming or other exclamations tending to show suffering, uttered at the time of the injury or immediately after the accident.<sup>11</sup> But, in that State, declarations made by the injured person some time after the injury, to persons other than the physician in attendance upon the person injured, simply that he or she is then suffering pain, are held to be not a part of the *res gestæ*, and, therefore, incompetent, although such evidence was admissible prior to the statute allowing parties to be witnesses.<sup>12</sup> It is also held that statements expressive of present conditions are allowed in evidence only when made to a physician for the purpose of treatment by him.<sup>13</sup> In other States it has been held that expressions of complaints showing bodily suffering are competent

such complaints should not, however, be admitted when made more than four years after the accident, and after the suit was brought and shortly before trial; *Mott v. Detroit, etc.*, R. Co., 120 Mich. 127, 79 N. W. 3, 6 Detroit Leg. N. 87, 15 Am. & Eng. R. Cas. N. S. 113, unless made to one in contemplation of his becoming a witness; *Beath v. Rapid R. Co.*, 119 Mich. 512, 78 N. W. 537, 15 Am. & Eng. R. Cas. N. S. 793, when made to a witness who observed them, although they relate to a period some length of time after the injuries complained of.

**11.** *Hagenlocher v. Coney Island, etc.*, R. Co., 99 N. Y. 136, 1 N. E. 536; *Nichols v. Brooklyn City R. Co.*, 30 Hun (N. Y.) 437; *Waldele v. N. Y. Cent. R. Co.*, 20 Hun (N. Y.) 35; *Murphy v. N. Y. Cent. R. Co.*, 60 Barb. (N. Y.) 125; *De Long v. Delaware, L. & W. R. Co.*, 37 Hun (N. Y.) 282; *Lewke v. Dry Dock, etc.*, R. Co., 46 Hun (N. Y.) 283; *Uransky v. Dry Dock, etc.*, R. Co., 44 Hun (N. Y.)

119; *Geiler v. Manhattan R. Co.*, 11 Misc Rep. (N. Y.) 413, 65 St. Rep. (N. Y.) 437, 32 N. Y. Supp. 254.

**12.** *Kennedy v. Rochester, etc.*, R. Co., 130 N. Y. 654, 41 St. Rep. (N. Y.) 329, 29 N. E. 141; *Roche v. Brooklyn, etc.*, R. Co., 105 N. Y. 294, 11 N. E. 630. Otherwise, before the Code, *Matteson v. N. Y. Cent. R. Co.*, 35 N. Y. 487; *Caldwell v. Murphy*, 11 N. Y. 416; *Brown v. N. Y. Cent. R. Co.*, 32 N. Y. 597; *Donohue v. Brooklyn, etc.*, R. Co., 53 App. Div. (N. Y.) 348, 65 N. Y. Supp. 634.

**13.** *Kennedy v. Rochester, etc.*, R. Co., 130 N. Y. 654, 41 St. Rep. (N. Y.) 329, 29 N. E. 141; *Davidson v. Cornell*, 132 N. Y. 228, 30 N. E. 573. See *contra*, *Matteson v. N. Y. Cent. R. Co.*, 35 N. Y. 487, holding that such expressions of pain, made to a physician examining the injured person, with a view of giving evidence, are admissible; *Schuler v. Third Ave. R. Co.*, 1 Misc. Rep. (N. Y.) 35, 48 St. Rep. (N. Y.) 663, 20 N. Y. Supp. 683.

evidence as part of the *res gestæ*, and may be testified to and described by any person in whose presence they were uttered, if they were made at the time of the suffering;<sup>14</sup> that evidence that the plaintiff complained of severe pains, sleeplessness, and want of appetite is admissible, where such results would probably follow the injuries sustained;<sup>15</sup> that evidence of the attending physician of plaintiff in an action for ejectment from a moving train, that on the day after such ejectment plaintiff complained to him of pain in his chest, side and leg, and that his wrist hurt him, is admissible as part of the *res gestæ*; that evidence that plaintiff complained to a witness, who came to him from the train after it had gone about thirty-five yards, as to the nature of his injuries, and that he could not go farther, is admissible as part of the *res gestæ*;<sup>16</sup> and that evidence as to what an injured person said at the time of the accident, indicating his pain, in the usual way, is admissible in an action for such injuries.<sup>17</sup> So it has been held competent to prove expressions by plaintiff at the time of the accident of pain and suffering or the indication thereof by groans or cries, and that plaintiff directly after the injury complained of his side.<sup>18</sup> So evidence of what deceased said shortly after the injury, as well as occurrences on the way to and after arriving at the hospital, concerning the pain which he was suffering, were held admissible as part of the *res gestæ*.<sup>19</sup> It has also been held that declarations of one caught and injured under car wheels, made very soon after he was caught and while he was still under the wheels, and evidence that a person injured in attempting to alight from a street car answered "Yes" to a question as to whether she was hurt, asked immediately after the injury, are admissible as part of the *res gestæ*.<sup>20</sup> So expressions of pain made by a person

**14.** *Williams v. Great Northern R. Co.*, 68 Minn. 55, 70 N. W. 860; *Brush v. St. Paul City R. Co.*, 52 Minn. 572, 55 N. W. 57.

**15.** *Omaha St. R. Co. v. Emminger*, 57 Nebr. 240, 77 N. W. 675, 12 Am. & Eng. R. Cas. N. S. 188.

**16.** *Missouri, etc., R. Co. v. Sanders*, 12 Tex. Civ. App. 5, 33 S. W. 245.

**17.** *Weiser v. Broadway, etc., R. Co.*, 10 Ohio C. C. 14, 2 Ohio Dec. 463.

**18.** *Indianapolis St. Ry. Co. v. Schmidt*, 163 Ind. 360, 3 St. Ry. Rep. 193, 71 N. E. 201.

**19.** *Rideout v. Winnebago Traction Co.*, 123 Wis. 297, 3 St. Ry. Rep. 944, 101 N. W. 672.

**20.** *Heckle v. Southern Pac. Co.*,

when taken from a wreck caused by a street car colliding with a vehicle in which he was riding, and similar expressions made immediately after being taken from the wreck are admissible as part of the *res gestæ*.<sup>21</sup> Crying is declared to be symptomatic of pain, and evidence thereof in connection with evidence of actual injuries to plaintiff is held admissible.<sup>22</sup> And it has been held proper for medical witnesses to state what plaintiff said to them concerning her bodily condition, subject, however, to the qualification that such declarations, being in favor of the party making them, are only competent when made as a part of the *res gestæ*, or to a physician during treatment, or upon an examination prior thereto, and without reference to the bringing of an action to recover damages for the injury complained of, unless the examination should be made at the instance of the defendant with a view to the trial.<sup>23</sup> But evidence given by a witness, not a physician, in an action against a street railway company to recover for personal injuries, in reply to the question as to when plaintiff complained of pain, that she saw the plaintiff the morning after the accident, when "she complained of her side and under the spine in the back and this ankle, that she screamed with the ankle awfully," is incompetent as being mere declarations of the plaintiff and hearsay, although evidence given by the witness that she saw the plaintiff the morning after the injury when "she was complaining awfully bad," is admissible as evidence of a mere exclamation by the plaintiff to show whether she was free from pain, or was restless and complaining.<sup>24</sup> So, statements of bystanders as to the injury of a pedestrian struck by a street car are inadmissible as part of the *res gestæ*, though made at the time

123 Cal. 441, 5 Am. Neg. Rep. 298, 56 Pac. 56; Springfield Consol. R. Co. v. Hoeffner, 175 Ill. 634, 51 N. E. 884, affg. 71 Ill. App. 162.

21. Denver City Tramway Co. v. Martin, 44 Colo. 324, 6 St. Ry. Rep. 605, 98 Pac. 836.

22. Montgomery St. Ry. Co. v. Shanks, 139 Ala. 489, 3 St. Ry. Rep. 11, 37 So. 166, holding also evidence

was admissible that plaintiff complained of pain the morning after the accident.

23. Chicago City Ry. Co. v. Bundy, 210 Ill. 39, 3 St. Ry. Rep. 126, 71 N. E. 28.

24. West Chicago St. R. Co. v. Kennelly, 170 Ill. 508, 48 N. E. 996, 9 Am. & Eng. R. Cas. N. S. 359, affg. 66 Ill. App. 244.

of the accident.<sup>25</sup> In an action against a street railroad company to recover for personal injuries, testimony given by the plaintiff's attending physician as to the condition of the plaintiff shortly prior to the trial to the effect "she tells me she suffers pain," is hearsay, and inadmissible.<sup>26</sup>

§ 493. **Declarations as to cause or manner of injury.** — The statements of an injured person as to how or why an accident occurred, or as to the cause of his injuries, or the manner in which they were inflicted, unless made at the time of the accident, or while the transaction was in progress so as to constitute a part of the occurrence itself, are generally held to be inadmissible.<sup>27</sup> Such

**25.** *Louisville Ry. Co. v. Johnson's Admr.*, 131 Ky. 277, 6 St. Ry. Rep. 706, 115 S. W. 207.

**25.** *West Chicago St. R. Co. v. Carr*, 170 Ill. 478, 48 N. E. 992, affg. 67 Ill. App. 530.

**27.** *Hall v. Cedar Rapids, etc., R. Co.*, 115 Iowa 18, 87 N. W. 739, holding that evidence of declarations made by plaintiff to a witness some days after the accident as to the manner of the injuries and of her sufferings was improperly received; *Edwards v. Foote*, (Mich.) 88 N. W. 404, 8 Detroit Leg. N. 880, holding that in an action for injuries received by plaintiff from the collision of a street car with a buggy in which he was riding, it was not error to refuse to permit the conductor to state what the driver of the buggy said concerning the accident, the conversation not being within plaintiff's hearing, and it not appearing that it was at or immediately after the accident; *Augusta, etc., R. Co. v. Randall*, 79 Ga. 304, holding that evidence that a passenger who claimed that she was thrown from a car to the ground made a statement of the manner in which she was injured at the house of a friend near

the place of the accident and shortly thereafter was improperly admitted as the statement formed no part of the *res gestæ*; *Perlmutter v. Highland St. Ry. Co.*, 121 Mass. 497, holding the statement of a passenger relative to the circumstances under which he was expelled from a train two days before inadmissible; *Leahey v. Cass Ave., etc., R. Co.*, 97 Mo. 165, 10 Am. St. Rep. 300, holding that in an action for the death of a boy caused by injuries received under a horse car, his declarations as to how he got under the car, made at the scene of the accident, and when first picked up, are admissible in evidence, but his declarations made after he had been removed and the persons connected with the accident had separated, and in answer to questions as to how he got injured, were inadmissible, though made only a short time after the accident; *Waldele v. N. Y. Cent., etc., R. Co.*, 95 N. Y. 274; *Martin v. New York, etc., R. Co.*, 103 N. Y. 626, 9 N. E. 505; *Downs v. N. Y. Cent., etc., R. Co.*, 47 N. Y. 83, holding that declarations by the injured person as to the way in which the accident occurred, made shortly after-

statements have been held admissible in certain cases, however, even though made a few moments after the accident, where the courts have regarded the declarations as verbal acts or facts illustrating, explaining, interpreting, or growing out of the transaction, and a part of the *res gestæ*, or receiving support from the transaction itself.<sup>28</sup> For example, it has been held that the declarations of a boy fourteen years old to his mother, within five or ten minutes after he had been run over by a street car and while he was lying between the tracks with his legs nearly severed from his body, that he was kicked off a car by the conductor, are admissible as *res gestæ*.<sup>29</sup> And statements made by one injured while employed by a railroad company, some minutes after the injury, in response to inquiries made by the witness, were held to be *res gestæ*.<sup>30</sup> Declarations, however, made by one injured by a street car in the middle of the street eighty feet wide, after he had arisen and walked to the sidewalk, in answer to a question as to what was the matter, that the conductor threw him off the car, were held not admissible as part of the *res gestæ* in an action for such injury, although no witnesses were produced on either side who saw the accident, or could testify to the manner in which

ward, and not as a part of the occurrence itself, are not a part of the *res gestæ*.

28. *Louisville, etc., Ry. Co. v. Buck*, 116 Ind. 566, 19 N. E. 453, 2 L. R. A. 520, holding that declarations of a decedent made within two minutes after the injury was sustained, while he remained in the presence of the train and the defective machinery causing the injury, were admissible as part of the *res gestæ*; *Leahey v. Cass Ave., etc., R. Co., supra*; *International, etc., R. Co. v. Smith*, (Tex.) 44 Am. & Eng. R. Cas. 324; *Pennsylvania R. Co. v. Lyons*, 129 Pa. St. 113, 15 Am. St. Rep. 701, 18 Atl. 759; *O'Keefe v. Eighth Ave. R. Co.*, 33 App. Div. (N. Y.) 324, 53 N. Y.

Supp. 940, holding the declaration by the plaintiff to a bystander, before he had been removed from the scene of the accident, that his trunk was struck by a street car, to be admissible against the defendant, notwithstanding it is made in his own favor, where one of defendant's witnesses has testified that he was with plaintiff from the time of the accident until his removal, and that he made no mention of his trunk having been struck by the car.

29. *Washington, etc., R. Co. v. McLane*, 11 App. D. C. 220, 25 Wash. L. Rep. 485.

30. *Houston, etc., R. Co. v. Loeffler*, (Tex.) 51 S. W. 536.

it occurred.<sup>31</sup> The statements of a patient to his physician in the course of the latter's examination of him, indicating the cause of the injury, were held to be inadmissible on the question of cause, especially where several days intervened between the injury and the examination.<sup>32</sup> In an action against a street railway company for negligently killing a five-year-old boy on its track while he was on his way to do a necessary errand for his sick mother, testimony of a physician to the boy's statement made in the ambulance on his way to the hospital within ten minutes after the accident, as to how it occurred, was held to be not admissible in behalf of the plaintiff as part of the *res gestæ*.<sup>33</sup> Where it was alleged that plaintiff was injured by defendant's negligence in suddenly starting the car as she was preparing to alight, and defendant introduced evidence of a conversation in which plaintiff's husband in her presence stated to two women who were talking about her bringing an action that there was no use bothering as the accident was due to her fault, and that plaintiff remained silent concerning this statement, it was held that testimony of the plaintiff in rebuttal that she did not remember any such conversation and that the women called to settle for a certain sum was properly admissible, in that it tended merely to modify, explain, and destroy the alleged admission by her and was not objectionable on the ground that it tended to show an offer of settlement.<sup>34</sup>

§ 494. Intoxication as evidence of contributory negligence. — One who voluntarily disables himself by reason of intoxication is held to the same degree of care and prudence for his safety as is required of a sober person.<sup>35</sup> If intoxication contributes to an injury in any degree as a proximate cause thereof, it is a com-

31. Chicago W. D. Ry. Co. v. Becker, 128 Ill. 515, 21 N. E. 524. 210 Ill. 39, 3 St. Ry. Rep. 126, 71 N. E. 28.

32. Webber v. St. Paul City R. Co., 67 Minn. 155, 69 N. W. 716.

33. Citizens' St. R. Co. v. Standard, 10 Ind. App. 278, 37 N. E. 723.

34. Chicago City Ry. Co. v. Bundy,

35. Smith v. Norfolk & S. R. Co., 114 N. Car. 728, 19 S. E. 863, 923; Chicago City Ry. Co. v. Lewis, 5 Ill. App. 242.

plete bar to any action for any damages sustained in consequence of it.<sup>36</sup> Even if contributory negligence has not been set up as a defense, evidence of intoxication would be admissible. Under a general denial a defendant can introduce testimony for the purpose of showing that the injury was caused by the negligence of the plaintiff, as this negatives the allegation of negligence by the defendant.<sup>37</sup> It is not in itself, as matter of law, such negligence as will bar a recovery, however, unless such intoxication was in some way the cause of, or contributed to, the accident or injury.<sup>38</sup> One somewhat intoxicated, but able to walk, is not, as matter of law, guilty of contributory negligence in attempting to cross a street railway track in front of a cable car, which is standing still on the track when he steps on the track.<sup>39</sup> The mere fact that a passenger at the time he was injured was intoxicated is not in itself evidence of contributory negligence, but it is a circumstance to be considered, and it is for the jury to determine whether it in fact contributed to his injury.<sup>40</sup> But the carrier is liable, notwithstanding such contributory negligence on the part of the plaintiff, when the conduct of the carrier was wilful or its negligence occurred subsequent to that of the injured person. Where plaintiff's husband, while drunk, lay down on a street car track, and the driver of the car, though seeing an object which he thought to be a bundle of grain, made no effort to stop his car, in which he could easily have succeeded, but drove directly over the person and so killed him,

**36.** *Fisher v. West Virginia & P. R. Co.*, 39 W. Va. 366, 19 S. E. 578, 23 L. R. A. 758, 58 Am. & Eng. R. Cas. 337; *Holland v. West End St. R. Co.*, 155 Mass. 387, 29 N. E. 622; *Butler v. Steinway R. Co.*, 87 Hun (N. Y.) 10, 67 St. Rep. (N. Y.) 498, 33 N. Y. Supp. 845; *Monk v. Town of New Utrecht*, 104 N. Y. 552, 11 N. E. 268; *Welty v. Indianapolis, etc., R. Co.*, 105 Ind. 55, 4 N. E. 410. The testimony of a witness characterizing the acts of the plaintiff as those of an intoxicated person is competent evidence. *Donoho v. Metropolitan St.*

*Ry. Co.*, 30 Misc. Rep. (N. Y.) 433, 62 N. Y. Supp. 523.

**37.** *Sharpton v. Augusta & A. Ry. Co.*, 72 S. C. 162, 4 St. Ry. Rep. 991, 51 S. E. 553.

**38.** *Denver Tramway Co. v. Reid*, 4 Colo. App. 53, 35 Pac. 269; *Ward v. Chicago, St. P., etc., R. Co.*, 85 Wis. 601, 55 N. W. 771.

**39.** *West Chicago St. Ry. Co. v. Ranstead*, 70 Ill. App. 111, 2 Chic. L. J. Wkly. 271.

**40.** *Trumbull v. Erickson*, 97 Fed. (Colo.) 891, 38 C. C. A. 536. What is sufficient evidence of the plaintiff's

the company was held liable.<sup>41</sup> If a locomotive engineer can or should see that a man walking on the track is drunk and unlikely to get out of the way, the company is liable, notwithstanding his contributory negligence, if, without slackening speed, it strikes him.<sup>42</sup> The knowledge of the condition of one who has become helpless by intoxication, and is known to be in a position of danger, imposes upon the carrier the duty of exercising special care and diligence.<sup>43</sup> But one who lay near a street railway track in a drunken stupor, and threw his feet over the nearest rail so that they were crushed by a passing car, may not recover of the company when the evidence shows that the motorman could not have stopped the car coming at the usual speed before reaching the plaintiff, had an effort to stop been made immediately after the plaintiff's feet were visible, and, although the conductor of another car saw plaintiff before he had thrown his feet upon the track, and reported that he was dangerously near the rail, and a man sent from the barn three blocks away to remove the plaintiff was unable to arrive before the injury.<sup>44</sup> Upon the question of the intoxication as rebutting the presumption of due care it is said that this is one of fact which the jury alone is authorized to determine, there being much evidence on both sides of the question.<sup>45</sup>

intoxication to go to the jury on the question of his own negligence as the cause of the accident. *Bradley v. Second Ave. R. Co.*, 8 *Daly* (N. Y.) 289.

**41.** *Werner v. Citizens' R. Co.*, 81 *Mo.* 368. A common carrier owes a duty to a drunken passenger not to jerk its train while he is getting off at a station where it has stopped. *Milliman v. N. Y. Cent., etc., R. Co.*, 66 *N. Y.* 642.

**42.** *St. Louis, Iron Mountain & So. R. Co. v. Wilkerson*, 46 *Ark.* 513.

See *Gill v. Rochester, etc., R. Co.*, 37 *Hun* (N. Y.) 107; *Louisville, C., etc., R. Co. v. Sullivan*, 81 *Ky.* 624, 50 *Am. Rep.* 186.

**43.** *Kean v. Baltimore, etc., R. Co.*, 61 *Md.* 154; *Seymer v. Town of Lake*, 66 *Wis.* 651, 29 *N. W.* 554.

**44.** *Kramer v. New Orleans City & L. R. Co.*, 51 *La. Ann.* 1689, 26 *So.* 411.

**45.** *Goff v. St. Louis Transit Co.*, 199 *Mo.* 694, 5 *St. Ry. Rep.* 660, 98 *S. W.* 49.

## CHAPTER XXIII.

## Presumptions.

SECTION 495. Presumptions as to negligence.

496. Presumption as to negligence — Instances when it does not arise.

497. Presumptions as to contributory negligence.

498. Presumption arising from instinct of self-preservation.

§ 495. Presumptions as to negligence. — Negligence is not generally presumed from the fact of damage or proof of the occurrence of an injury.<sup>1</sup> So a presumption of negligence does not follow the simple and unexplained fact of an injury to a passenger while

1. *Alabama*. — *Louisville, etc., R. Co. v. Allen*, 78 Ala. 494, 28 Am. & Eng. R. Cas. 514.

*District of Columbia*. — *Metropolitan Ry. Co. v. Snashall*, 22 Wash. Law Rep. 377.

*Iowa*. — *Case v. Chicago, etc., R. Co.*, 64 Iowa 762, 19 Am. & Eng. R. Cas. 142, 21 N. W. 30.

*Kansas*. — *Jackson v. Kansas City R. Co.*, 31 Kan. 761, 15 Am. & Eng. R. Cas. 178.

*Louisiana*. — *Weber v. New Orleans & C. R. Co.*, 104 La. 367, 28 So. 892.

*Maryland*. — *Philadelphia, etc., R. Co. v. Stebbing*, 62 Md. 504, 19 Am. & Eng. R. Cas. 36; *Barnard v. Philadelphia, etc., R. Co.*, 60 Md. 555, 15 Am. & Eng. R. Cas. 484; *State v. Baltimore, etc., R. Co.*, 58 Md. 221.

*Massachusetts*. — *Cassady v. Old Colony St. Ry. Co.*, 184 Mass. 156, 68 N. E. 10; *Wadsworth v. Boston Elev. Ry. Co.*, 182 Mass. 572, 60 N. E. 421.

*Michigan*. — *Mynning v. Detroit, etc., R. Co.*, 59 Mich. 257, 23 Am. &

Eng. R. Cas. 317; *Brown v. Congress, etc., R. Co.*, 49 Mich. 153, 8 Am. & Eng. R. Cas. 383.

*Missouri*. — *Peck v. St. Louis Transit Co.*, 178 Mo. 617, 77 S. W. 736; *Buesching v. St. Louis Gas Light Co.*, 6 Mo. App. 85.

*Nebraska*. — *Lincoln Traction Co. v. Webb*, 73 Neb. 136, 3 St. Ry. Rep. 588, 102 N. W. 258, disapproving *Lincoln St. R. Co. v. McClellan*, 54 Neb. 672, 74 N. W. 1074, 69 Am. St. Rep. 736.

*New Jersey*. — *Paynter v. Bridgeton & M. Traction Co.*, 67 N. J. L. 619, 52 Atl. 367.

*New York*. — *Holbrook v. Utica, etc., R. Co.*, 12 N. Y. 236, 64 Am. Dec. 502, note; *Wilde v. Metropolitan St. R. Co.*, 10 App. Div. 364, 41 N. Y. Supp. 931, affd., 161 N. Y. 665, 57 N. E. 1128.

*Ohio*. — *Cleveland, etc., R. Co. v. Crawford*, 24 Ohio St. 631, 15 Am. Rep. 633. "There is no presumption of negligence as against either party except such as arises from the facts

on a car, but the cause or, at least, the nature of the accident resulting in the injury must be shown, for it is upon the character or nature of the accident that presumption of negligence must rest.<sup>2</sup> The presumption of the proper performance of duty applies in cases of alleged negligence, as in all other cases, yet the circumstances under which an injury occurred may be such as to create the presumption of negligence.<sup>3</sup> In such cases the rule

proved. Indeed, the presumption of law is that neither party was guilty of negligence, and such presumption must prevail until overcome by proof."

*Pennsylvania.*—Flemming v. Pittsburgh R. Co., 158 Pa. St. 130, 27 Atl. 858, 38 Am. St. Rep. 835; Federal St., etc., R. Co. v. Gibson, 96 Pa. St. 83; Delaware, etc., R. Co. v. Napheys, 90 Pa. St. 135, 1 Am. & Eng. R. Cas. 52.

*South Carolina.*—Carter v. Columbia, etc., R. Co., 19 S. Car. 20, 15 Am. & Eng. R. Cas. 414.

*Tennessee.*—East Tennessee, etc., R. Co. v. Stewart, 13 Lea 432, 21 Am. & Eng. R. Cas. 614.

*Texas.*—Missouri Pac. R. Co. v. Foreman, 73 Tex. 311, 11 S. W. 326.

As to presumptions of negligence. See Moore on Carriers, pages 777-787; see note 4 St. Ry. Rep. 51.

Presumption of negligence from mere proof of injury. See note 4 St. Ry. Rep. 351 *et seq.*

2. Chicago City R. Co. v. Reed, 163 Ill. 477, 45 N. E. 238, 54 Am. St. Rep. 478; McGinn v. New Orleans Ry. & L. Co., 118 La. 811, 5 St. Ry. Rep. 360, 43 So. 450.

3. *United States.*—Robinson v. N. Y. Cent. R. Co., 20 Blatchf. 338.

*California.*—Houghton v. Market St. Ry. Co., 1 Cal. App. 576, 4 St. Ry. Rep. 80, 82 Pac. 972; Bassett v. Los Angeles Traction Co., 133 Cal. 1, 65 Pac. 470.

*Illinois.*—Elgin A. & S. Tr. Co. v.

Wilson, 217 Ill. 47, 4 St. Ry. Rep. 193, 75 N. E. 436; Chicago Union Traction Co. v. Newmiller, 215 Ill. 383, 4 St. Ry. Rep. 165, 74 N. E. 410; Chicago City Ry. Co. v. Rood, 163 Ill. 477, 45 N. E. 238, 54 Am. St. Rep. 478.

*Indiana.*—Bedford, etc., R. Co. v. Rainbolt, 99 Ind. 551, 21 Am. & Eng. R. Cas. 466.

*Missouri.*—Mageane v. St. Louis & Sub. Ry. Co., 183 Mo. 119, 3 St. Ry. Rep. 563, 81 S. W. 1158; Dougherty v. Missouri R. Co., 81 Mo. 325, 21 Am. & Eng. R. Cas. 497, 51 Am. Rep. 239; Bird v. St. Louis Transit Co., 115 Mo. App. 202, 5 St. Ry. Rep. 645, 91 S. W. 993; Choquette v. Southern Elec. R. Co., 80 Mo. App. 515.

*Nebraska.*—Lincoln Traction Co. v. Shepherd, 74 Neb. 369, 4 St. Ry. Rep. 677, 107 N. W. 764, 104 N. W. 882.

*New Jersey.*—Shay v. Camden & S. Ry. Co., 66 N. J. L. 334, 49 Atl. 547; Whalen v. Consolidated Traction Co., 61 N. J. L. 606, 40 Atl. 645, 41 L. R. A. 836.

*New York.*—Loudoun v. Eighth Ave. R. Co., 162 N. Y. 380, 56 N. E. 988; Braun v. Union Ry. Co., 115 App. Div. 566, 5 St. Ry. Rep. 767, 100 N. Y. Supp. 1012; German v. Brooklyn Heights R. Co., 107 App. Div. 354, 4 St. Ry. Rep. 848, 95 N. Y. Supp. 112; Seybolt v. New York, etc.,

*res ipsa loquitur* applies, and, when that which caused the injury is shown to have been under the management and control of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation, that the accident arose from want of care, and there is said to be a presumption of negligence sufficient to entitle plaintiff to go to the jury. The reasons of the rule are that defendant is liable for the negligence of his employees as well as for his own, and that he or his servants being in the exclusive management and control of that which caused the injury, the injury is more naturally to be attributed to his own acts or omissions than to those of a stranger, and his means and sources of knowledge are superior to those of the plaintiff. Therefore, in the absence of an explanation showing by proof that the accident was caused by another, or by some other cause for which the carrier was not responsible, there is a presumption of negligence on his part.<sup>4</sup> The rule that proof of the occurrence of an

R. Co., 95 N. Y. 562, 18 Am. & Eng. R. Cas. 162; *Lowery v. Manhattan R. Co.*, 99 N. Y. 158, 1 N. E. 608; *Wiedmer v. New York Elev. R. Co.*, 41 Hun 284; *Holbrook v. Utica, etc., R. Co.*, 12 N. Y. 236, 64 Am. Dec. 502, note.

*Pennsylvania*.—*Dougherty v. Pittsburgh Ry. Co.*, 213 Pa. St. 346, 4 St. Ry. Rep. 964, 62 Atl. 926; *Abel v. Northampton Traction Co.*, 212 Pa. St. 329, 4 St. Ry. Rep. 960, 61 Atl. 915; *Campbell v. Consolidated Traction Co.*, 201 Pa. St. 167, 50 Atl. 827.

*Texas*.—*Texas, etc., R. Co. v. Suggs*, 62 Tex. 323.

*Washington*.—*Firebaugh v. Seattle Electric Co.*, 40 Wash. 658, 4 St. Ry. Rep. 1055, 82 Pac. 955.

*Wisconsin*.—*Mulcairns v. City of Janesville*, 67 Wis. 24, 29 N. W. 565.

*England*.—*Kearney v. London,*

*etc., R. Co., L. R.*, 5 Q. B. 411, 6 Q. B. 759; *Piggott v. Eastern, etc., R. Co.*, 3 C. B. 229; *Scott v. London, etc., Docks Co.*, 3 Hurl. & Colt. 596.

4. *United States*.—*Gleeson v. Virginia Midland R. Co.*, 140 U. S. 435, 11 S. Ct. 859.

*California*.—*Judson v. Giant Powder Co.*, 107 Cal. 549, 40 Pac. 1020, 48 Am. St. Rep. 146, 29 L. R. A. 718.

*Maryland*.—*Howser v. Cumberland, etc., R. Co.*, 80 Md. 146, 30 Atl. 906, 27 L. R. A. 154.

*Massachusetts*.—*Feital v. Middlesex R. Co.*, 109 Mass. 398, 12 Am. Rep. 720; *White v. Boston, etc., R. Co.*, 144 Mass. 404, 11 N. E. 552; *Hicks v. New York, etc., R. Co.*, 164 Mass. 424, 41 N. E. 721.

*Minnesota*.—*Ryder v. Kinsey*, 62 Minn. 85, 64 N. W. 94.

*New York*.—*Volkmar v. Manhat-*

accident causing injury to a passenger arising from any disarrangement or displacement of the track or car of a street railroad company, operated by electricity, steam, cable power, or otherwise, or from a defect in any of those things which the carrier is bound to supply, is in itself presumptive evidence of the negligence of the carrier, is generally held, except that in certain jurisdictions proof is also required on the part of the passenger that the accident occurred without fault on his part.<sup>5</sup> Such proof being made casts

tan R. Co., 134 N. Y. 418, 31 N. E. 870; *Jones v. Union Ry. Co.*, 18 App. Div. 267, 46 N. Y. Supp. 321; *Kaiser v. Latimer*, 40 App. Div. 149, 57 N. Y. Supp. 833, but where the proof of negligence rests upon the plaintiff, a presumption of defendant's negligence, arising from the facts, does not change the burden of proof.

*Ohio*. — *Iron R. Co. v. Mowrey*, 36 Ohio St. 418, 38 Am. Rep. 597.

*Wisconsin*. — *Cummings v. National Furnace Co.*, 60 Wis. 603, 18 N. W. 742, 20 N. W. 665; *Kirst v. Milwaukee, etc., R. Co.*, 46 Wis. 489, 1 N. W. 89.

*England*. — *Scott v. London Docks Co.*, 3 H. & C. 596; *Carpue v. London, etc., R. Co.*, 5 Q. B. 747; *Kearney v. London, etc., R. Co.*, L. R., 6 Q. B. 759; *Kinney v. London, etc., R. Co.*, L. R. 5 Q. B. 411.

See also cases cited in the preceding note

5. *California*. — *Borqui v. Sutro R. Co.*, 131 Cal. 390, 63 Pac. 682.

*Illinois*. — *Brimmer v. Illinois Cent. R. Co.*, 101 Ill. App. 198; *Elgin City R. Co. v. Wilson*, 56 Ill. App. 364.

*Kentucky*. — *Davis v. Paducah Ry. & Light Co.*, 24 Ky. L. Rep. 135, 68 S. W. 140.

*New York*. — *Curtis v. Rochester & Syracuse R. Co.*, 18 N. Y. 534; *Bowen v. New York Cent. R. Co.*, 18

N. Y. 408; *Adam v. Union Ry. Co.*, 80 App. Div. 136, 80 N. Y. Supp. 264; *Hastings v. Central Crosstown R. Co.*, 7 App. Div. 312, 40 N. Y. Supp. 93.

*Ohio*. — *Cleveland City Ry. Co. v. Osborn*, 66 Ohio St. 45, 63 N. E. 604.

*Pennsylvania*. — *Clow v. Pittsburgh Traction Co.*, 158 Pa. St. 410, 27 Atl. 1004.

**Where a car is started with great violence** it is a fair inference that such violence could not have been the result of anything than the improper application of the power to move the car, and negligence on the part of the railway company. *Grotsch v. Steinway R. Co.*, 19 App. Div. (N. Y.) 130, 45 N. Y. Supp. 1075. See *Jonas v. Long Island R. Co.*, 47 N. Y. Supp. 149, 21 Misc. Rep. (N. Y.) 306; *Ferry v. Manhattan R. Co.*, 118 N. Y. 497, 23 N. E. 822, 29 St. Rep. (N. Y.) 933; *Martin v. Second Ave. R. Co.*, 3 App. Div. (N. Y.) 448, 38 N. Y. Supp. 220.

**An inference of negligence attributable to a carrier may arise** when a passenger is injured through some defect in the carrier's appliances, or some act or omission of the carrier's servant, which might have been prevented by a high degree of care. *Whalen v. Consol. Tract. Co.*, 61 N. J. L. 606, 40 Atl. 645, 11

the burden on the defendant to show that it and its agents were

Am. & Eng. R. Cas. N. S. 207, 4 Am. Neg. Rep. 422, 41 L. R. A. 836. The presumption of negligence toward a passenger may be drawn from proof of the breaking down of some of the means of transportation employed by a street railway company." *Choquette v. Southern Elec. R. Co.*, 80 Mo. App. 515, 2 Mo. App. Rep. 655. Inference of negligence on the part of an electric railroad company arises from unexplained evidence in an action for injuries to a girl ten years old by jumping from a car, that the car appeared to be on fire. *Poulson v. Nassau Elec. R. Co.*, 18 App. Div. (N. Y.) 221, 45 N. Y. Supp. 941.

**Proof** that a passenger on a street car while exercising ordinary care for her own safety was injured by the operation of the road casts upon the company the burden of negating negligence on its part. *West Chicago St. R. Co. v. Kennelly*, 66 Ill. App. 244, 1 Chic. L. J. Wkly. 436. Proof of the improper condition of a street railway track, causing an injury to a traveler on the street, makes a *prima facie* case of negligence against the company, which, however, may be rebutted by evidence tending to show that such condition had not existed a sufficient time to admit of its being remedied before the accident. *Casper v. Dry Dock, etc., R. Co.*, 23 App. Div. (N. Y.) 451, 48 N. Y. Supp. 352. The breaking of a trolley pole while being manipulated in the usual way to reverse the direction of the car imposes upon the carrier the burden of proving its lack of negligence, in an action by a passenger injured by the accident. *Keator v. Scranton Traction Co.*, 191 Pa. St. 102, 44 W. N. C. 128, 6 Am. Neg. Rep. 187, 44 L. R.

A. 546, 43 Atl. 86. To throw upon a carrier the burden of disproving negligence in case of injury to a passenger, it must first be shown that the injury complained of resulted from the breaking of the machinery, collision, derailment of the cars, or something improper or unsafe in the conduct of the business or in the appliances of transportation. *Thomas v. Philadelphia, etc., R. Co.*, 1 Pa. Adv. Rep. 484, 15 L. R. A. 416, 30 W. N. C. 9, 23 Atl. 989. Presumption of negligence from the mere happening of the accident. *Loudoun v. Eighth Ave. R. Co.*, 162 N. Y. 380, 56 N. E. 988; revg. 16 App. Div. (N. Y.) 152, 44 N. Y. Supp. 742; *Hamilton v. Great Falls R. Co.*, 17 Mont. 334, 42 Pac. 860, 43 Pac. 713; *Lincoln St. R. Co. v. McClellan*, 54 Neb. 672, 74 N. W. 1074, 69 Am. St. Rep. 736; disapproved in *Lincoln Traction v. Webb*, 73 Neb. 136, 3 St. Ry. Rep. 588, 102 N. W. 258. When negligence not presumed. *Elliot v. Newport, etc., R. Co.*, 18 R. I. 707, 23 L. R. A. 208; *Adams v. Washington, etc., R. Co.*, 9 App. D. C. 26; *Chicago City R. Co. v. Rood*, 163 Ill. 477, 45 N. E. 238; *Hawkins v. Front St. Cable R. Co.*, 3 Wash. 592, 28 Pac. 1021. Proof of mere injury to a passenger on a street car does not raise the presumption of negligence sufficient to impose on the company the burden of proving due care on its part; and it is incumbent on plaintiff to show an accident from which the injury resulted, or circumstances of such character as to impute negligence. *McDonald v. Montgomery St. R. Co.*, 110 Ala. 161, 20 So. 317. No presumption of negligence on the part of a street car company arises from an accident to a

without fault.<sup>6</sup> It has been held by the courts in certain jurisdictions that this presumption of negligence arises only when there exists a contractual relation, like that of passenger and carrier, between the parties, and that it does not apply to persons holding other relations.<sup>7</sup> But it is held elsewhere that a contractual relation is not essential, and that the same presumption

passenger, where the facts show that it might as well have occurred through the negligence of the passenger as the negligence of the company. *Dresslar v. Citizens' St. R. Co.*, 19 Ind. App. 383, 47 N. E. 651.

**Where a passenger was injured by sawdust blowing in her eye** from an elevated railroad structure adjoining defendant's depot, and plaintiff testified that she did not know whether the sawdust was thrown or blew down, it being proved that there was a wind blowing at the time from fourteen to twenty-two miles an hour, plaintiff was not entitled to recover under the doctrine of *res ipsa loquitur*. *Wadsworth v. Boston Elev. Ry. Co.*, (Mass.) 60 N. E. 421.

6. *United States* — *Texas & P. R. Co. v. Gardner*, 114 Fed. 186, 52 C. C. A.

*California*. — *McCurrie v. Southern Pac. Co.*, 122 Cal. 561, 55 Pac. 324; *Bassett v. Los Angeles Traction Co.*, 133 Cal. 19, 22 Am. & Eng. R. Cas. N. S. 5, 65 Pac. 470.

*Illinois*. — *Calumet Elec. St. Ry. Co. v. Jennings*, 83 Ill. App. 612.

*Missouri*. — *Olsen v. Citizens' Ry. Co.*, 152 Mo. 426, 54 S. W. 470; *Clark v. Railroad Co.*, 127 Mo. 210, 29 S. W. 1016.

*New Jersey*. — *Scott v. Bergen Co. Traction Co.*, 63 N. J. L. 407, 43 Atl. 1060; *affd.* 64 N. J. L. 362, 48 Atl. 1118.

*New York*. — *Hill v. Railroad Co.*, 109 N. Y. 239, 16 N. E. 61.

*Pennsylvania*. — *Smedley v. Hestonville, etc.*, R. Co., 184 Pa. St. 620, 39 Atl. 544, 9 Am. & Eng. R. Cas. N. S. 649; *Steele v. Consolidated Traction Co.*, 30 Pittsb. L. J. N. S. 290.

7. *Huff v. Austin*, 46 Ohio St. 386, 21 N. E. 864, 15 Am. St. Rep. 613; *Young v. Bransford*, 12 Lea (Tenn.) 232.

**In an action against the company, brought by a person not a passenger, the law has been held in some cases not to raise a presumption of negligence against the defendant.** In such cases, on the issue of defendant's negligence, the burden of proof rests on the plaintiff, and he cannot recover without establishing the fact alleged by a fair preponderance of evidence. *Button v. Hudson River R. Co.*, 18 N. Y. 248; *Philadelphia City Pass. Ry. Co. v. Henrice*, 92 Pa. St. 431; *North Chicago City Ry. Co. v. Louis*, 138 Ill. 9, 27 N. E. 451; *O'Neil v. Dry Dock, etc.*, R. Co., 129 N. Y. 125, 29 N. E. 84; *Thomas v. Citizens' Pass. Ry. Co.*, 132 Pa. St. 504, 19 Atl. 286; *Roller v. Sutter St. R. Co.*, 66 Cal. 230, 5 Pac. 108; *North Side St. Ry. Co. v. Want (Tex.)*, 15 S. W. 40; *Gumb v. Twenty-Third St. Ry. Co.*, 58 N. Y. Super. Ct. 1; *Girard College Pass. Ry. Co. v. Middleton*, 3 W. N. C. (Pa.) 486; *Potts v. Chicago City Ry. Co.*, 33 Fed. 610.

arises when such relation does not exist.<sup>8</sup> The statutes in some States provide that in certain cases proof of injury shall raise a presumption of negligence which it devolves upon the defendant to rebut.<sup>9</sup> Proof of the violation of such a statute is evidence simply of one of the elements of negligence, that defendant failed to exercise ordinary care, and the elements of duty and proximate cause of the injury have still to be established.<sup>10</sup> When a presumption of negligence arising from the fact of derailment of a car is met by evidence which makes it equally probable that the accident was not due to negligence on the part of the company, in

**8.** *Rose v. Stephens Transp. Co.*, 11 Fed. 483; *Judson v. Giant Powder Co.*, 107 Cal. 549, 40 Pac. 1020, and other cases, *supra*.

**9.** *Chicago, etc., R. Co. v. Trotter*, 60 Miss. 442; *Mobile, etc., R. Co. v. Dale*, 61 Miss. 206, 20 Am. & Eng. R. Cas. 651; *Vicksburg, etc., R. Co. v. Phillips*, 64 Miss. 693, 30 Am. & Eng. R. Cas. 587, 2 So. 537; *Columbus, etc., R. Co. v. Kennedy*, 78 Ga. 646, 31 Am. & Eng. R. Cas. 92, 3 S. E. 267; *Central R. Co. v. Brinson*, 64 Ga. 475, 8 Am. & Eng. R. Cas. 343; *Vickers v. Atlanta, etc., R. Co.*, 64 Ga. 306, 8 Am. & Eng. R. Cas. 337. In Mississippi and Georgia the presumption against the railroad company arises in all cases of injury. In other states, where there is such a statute, the presumption arises only in cases of injury to property by fire.

**10.** *United States*. — *Hayes v. Michigan, etc., R. Co.*, 111 U. S. 228, 15 Am. & Eng. R. Cas. 394, 4 S. Ct. 369.

*Georgia*. — *Atlanta, etc., R. Co. v. Wyly*, 65 Ga. 120, 8 Am. & Eng. R. Cas. 262; *Augusta, etc., R. Co. v. Me-Elmurry*, 24 Ga. 75.

*Illinois*. — *Quincy, etc., R. Co. v. Wellhoener*, 72 Ill. 60.

*Indiana*. — *Pennsylvania R. Co. v.*

*Hensil*, 70 Ind. 569; *Chicago, etc., R. Co. v. Boggs*, 101 Ind. 522, 51 Am. Rep. 761.

*Iowa*. — *Correll v. Baltimore, etc., R. Co.*, 38 Iowa 120.

*Maryland*. — *Philadelphia, etc., R. Co. v. Stebbing*, 62 Md. 504, 19 Am. & Eng. R. Cas. 36; *Philadelphia, etc., R. Co. v. Kerr*, 25 Md. 521.

*Massachusetts*. — *Hanlon v. South Boston, etc., R. Co.*, 129 Mass. 31.

*Mississippi*. — *New Orleans, etc., R. Co. v. Toulme*, 59 Miss. 284.

*Missouri*. — *Karle v. Kansas City, etc., R. Co.*, 55 Mo. 476.

*New Hampshire*. — *Clark v. Boston, etc., R. Co.*, 64 N. H. 323, 10 Atl. 676, 31 Am. & Eng. R. Cas. 548.

*New York*. — *McGrath v. New York, etc., Co.*, 63 N. Y. 522; *Briggs v. N. Y. Cent. R. Co.*, 72 N. Y. 26.

*Wisconsin*. — *Hoppe v. Chicago, etc., R. Co.*, 61 Wis. 357, 21 N. W. 227.

In Tennessee only is proof of a violation of the statute at the time of the injury held to be conclusive evidence of defendant's liability. *Tennessee R. Co. v. Walker*, 11 Heisk. (Tenn.) 383; *Nashville, etc., R. Co. v. Thomas*, 5 Heisk. (Tenn.) 262; *Collins v. East Tennessee R. Co.*, 9 Heisk. (Tenn.) 841.

the absence of other evidence tending to establish the affirmative of the issue, the defendant is entitled to a verdict.<sup>11</sup>

**§ 496. Presumption as to negligence — Instances when it does not arise.** — No presumption of negligence on the part of the company arises from the mere fact that a passenger is injured while attempting to alight.<sup>12</sup> And negligence on the part of the street car company cannot be presumed from the mere falling of a person from the platform of a car, when there was no derailment, collision, or failure of means or appliances for transportation.<sup>13</sup> And to enable a passenger to recover for injuries from a street railway company operating its cars by cable, it is not enough to show that there was a jerk in the cable which threw the plaintiff from the car, but it must affirmatively appear that the jerk was an extraordinary or unusual one, or attributable to a defect in the track, an imperfection in the car or apparatus, or to a dangerous rate of speed, or to unskilful handling of the car by the gripman.<sup>14</sup> And it has been held that where plaintiff, while a passenger on defendant's railroad, was walking in the aisle of a car, and was injured by a jerk of the train as it was preparing to stop, it was error to instruct that, "when a passenger is injured by a collision or other accident while on his journey, the law presumes the acci-

**11.** *Omaha St. Ry. Co. v. Boesen*, 74 Neb. 764, 4 St. Ry. Rep. 669, 105 N. W. 303.

**12.** *Blake v. Camden Interstate Ry. Co.*, 57 W. Va. 300, 3 St. Ry. Rep. 927, 50 S. E. 408.

**13.** *Metropolitan Ry. Co. v. Snashall*, (D. C.) 22 Wash. L. Rep. 377. And in a suit for damages for personal injuries received by being thrown to the ground in attempting to board a street railway car while barely moving as it reached the street crossing, plaintiff must show some fault on the part of the employees of the company. *Weber v. New Orleans & C. R. Co.*, 104 La. 367, 28 So. 892;

*Etson v. Ft. Wayne & B. I. R. Co.*, 110 Mich. 494, 68 N. W. 298; *Chicago City R. Co. v. Catlin*, 70 Ill. App. 97.

**14.** *Bartley v. Metropolitan St. R. Co.*, 148 Mo. 124, 5 Am. Neg. Rep. 635, 49 S. W. 840. See also *Adams v. Washington, etc., R. Co.*, 24 Wash. L. R. 634, 9 App. D. C. 34; *Metropolitan R. Co. v. Snashall*, 3 App. D. C. 420; *Hayes v. Forty-Second, etc., St. R. Co.*, 97 N. Y. 259; *Stager v. Ridge Ave. Pass. R. Co.*, 119 Pa. St. 70; *Muller v. Second Ave. R. Co.*, 16 Jones & S. (N. Y.) 546; *Holland v. West End St. R. Co.*, 155 Mass. 357; *Baltimore & Y. Turnp. Road Co. v. Cason*, 72 Md. 377, 20 Atl. 113; *Bar-*

dent to be due to want of proper care on the part of the company and puts the burden of showing the actual condition of the track, car, or other appliances on the carrier;" that the legal presumption "puts the carrier at once on the defense," and that "plaintiff has established a *prima facie* case when she shows that she was injured while a passenger by the manner in which defendant used or directed some agency or instrumentality under its control, as it is only when a passenger shows that his injury results from an accident to the appliances that it is unnecessary for him, in the first instance, to do more than show that it was due to some failure or insufficiency of the appliances."<sup>15</sup> So the fact that persons are not ordinarily thrown from their seats in a car in rounding a curve does not justify the presumption that an injury so caused was due to want of care of the defendant.<sup>16</sup> A mere fall from a street car, without any evidence to show how it was occasioned, raises no presumption of negligence on the part of the street car company.<sup>17</sup> The mere fact that a rail broke does not warrant a finding that a passenger injured by a car running off the track in consequence thereof was injured through the carrier's negligence.<sup>18</sup> The mere fact that a passenger is thrown off the platform of a car on its starting up after a stop is not sufficient evidence that it was negligently started.<sup>19</sup> In the absence of evidence as to the speed with which an electric car is driven around a curve, the fact that its jerk as it strikes the side track is sufficient to throw a passenger down is not enough to warrant an inference of negligent management in rounding the curve.<sup>20</sup> Failure of a street railway company to carry a passenger safely to the place of his destination, without fault on his part, is not *prima facie* negligence on the

tle v. Houghton Co. St. R. Co., 132 Mich. 290, 93 N. W. 620, 9 Detroit Leg. N. 595.

15. Denver & R. G. R. Co. v. Fotheringham, 17 Colo. 410, 68 Pac. 978.

16. Wilder v. Metropolitan St. Ry. Co., 10 App. Div. (N. Y.) 364, 41 N. Y. Supp. 931; *affd.*, 161 N. Y. 665, 57 N. E. 1128.

17. Paynter v. Bridgton & M. Trac. Co., 67 N. J. L. 619, 52 Atl. 367.

18. Cole v. N. Y. Cent. R. Co., 48 N. Y. 679.

19. Hayes v. Forty-Second St., etc., R. Co., 97 N. Y. 259.

20. Ayers v. Rochester Ry. Co., 156 N. Y. 104, 50 N. E. 960.

part of the company.<sup>21</sup> And an accident to a person waiting for a street car, who is struck by the sudden switching of the car upon a side track, does not make a *prima facie* case of negligence on the part of the carrier.<sup>22</sup> The mere fact that an employee is killed by a fall from a hand car while crossing a bridge of his employer's railroad is not evidence that the killing was caused by the negligence of the employer's agents or servants.<sup>23</sup> Negligence on the part of the driver of a horse car cannot be inferred from his mere failure to stop the car within a distance of from thirteen to eighteen feet from a child who has fallen upon the track.<sup>24</sup> Negligence on the part of an employer cannot be inferred from the mere fact that an accident happened to an employee.<sup>25</sup> The doctrine *res ipsa loquittur* does not apply in an action for personal injuries by the conductor of a cable car of one company against another company, based on the fact that the latter company was repairing the crossing of the lines of the two companies, where the circumstances would justify the inference that the accident, which was caused by the displacement of the slot in which the grip ran, was caused by the negligence of the gripman of the plaintiff's car in disregarding directions to run slowly over the crossing.<sup>26</sup> A *prima facie* case is not made out against a street railroad company in an action for personal injuries, based upon the breach of an *ultra vires* city ordinance, by the mere introduction of the ordinance in evidence without objection, in the absence of proof that defendant agreed to be bound by it.<sup>27</sup> Negligence of a street railway company cannot be presumed from the mere fact that the wheels of a buggy fell into a cable slot, because that may have been caused by some concealed imperfection of which the company had no actual or implied notice.<sup>28</sup> Where the passenger shows that his injury

21. *Mt. Adams, etc., R. Co. v. Isaacs*, 18 Ohio C. C. 177.

22. *Donovan v. Hartford St. R. Co.*, 65 Conn. 201, 32 Atl. 350.

23. *Jones v. Alabama Mineral R. Co.*, 107 Ala. 400, 18 So. 30.

24. *Lavin v. Second Ave. R. Co.*, 12 App. Div. (N. Y.) 381, 42 N. Y. Supp. 512.

25. *Lincoln St. R. Co. v. Cox*, 48 Neb. 807, 67 N. W. 740, 4 Am. & Eng. R. Cas. N. S. 273.

26. *Bailey v. Citizens' R. Co.*, 152 Mo. 449, 52 S. W. 406.

27. *Sanders v. Southern Elec. R. Co.*, 147 Mo. 411, 48 S. W. 855.

28. *Miller v. United Rys. & Elec. Co.*, 108 Md. 84, 69 Atl. 636.

was caused by some breaking of machinery, a collision, derailment of cars, or something improper or unsafe in the conduct of the business or in the appliances of transportation, he need go no further, since from any such happening a presumption of negligence on the part of the carrier arises.<sup>29</sup> If injury to a passenger is caused by apparatus wholly under control of the carrier, furnished and applied by it, a presumption of negligence on its part is raised.<sup>30</sup> When plaintiff, who was a passenger, was injured by the sudden and unexplained stopping of defendant's street car, and on the trial introduced proof of such occurrence and rested; defendant then produced four of its employees, who testified to the use of the best known appliances, careful supervision, and skilful service; the court held that a dismissal of plaintiff's complaint was error, since under the doctrine of *res ipsa loquitur* proof of the accident cast the burden of explanation on the defendant.<sup>31</sup> Where it appears that a street car was suddenly stopped

**29.** *McRae v. Metropolitan St. Ry. Co.*, 125 Mo. App. 562, 5 St. Ry. Rep. 636, 102 S. W. 1032, citing *Thomas v. Philadelphia & R. R.*, 148 Pa. St. 180, 23 Atl. 989, 15 L. R. A. 416; *Clark v. Chicago & A. R. Co.*, 127 Mo. 197, 29 S. W. 1013; *Goodloe v. Metropolitan St. Railway*, 120 Mo. App. 194, 96 S. W. 482; *Bowlin v. Union Pacific R. Co.*, 125 Mo. App. 419, 102 S. W. 631.

**30.** *Chicago City Ry. Co. v. Catlin*, 70 Ill. App. 97; *Lincoln Traction Co. v. Shepherd*, 74 Neb. 369, 4 St. Ry. Rep. 677, 107 N. W. 764, 104 N. W. 882; *Dougherty v. Pittsburgh Rys. Co.*, 213 Pa. St. 346, 4 St. Ry. Rep. 964, 62 Atl. 926.

Where the plaintiff was a passenger on a street car a *prima facie* case is made out by showing the happening of the accident during the course of transportation, and if the injury was caused by apparatus wholly under its control, furnished and applied

by it, a presumption of negligence on the part of the company is raised, and the burden is on the latter to prove itself not guilty of negligence. *Chicago St. Ry. Co. v. Morse*, 98 Ill. App. 662; *affd.*, 197 Ill. 327, 64 N. E. 304; *Chicago St. Ry. Co. v. Carroll*, 102 Ill. App. 202; *Davis v. Paducah Ry. & L. Co.*, 24 Ky. Law Rep. 135, 68 S. W. 140.

**31.** *Langley v. Metropolitan St. Ry. Co.*, 74 N. Y. Supp. 857, 36 Misc. Rep. (N. Y.) 804. But see *Hoffman v. Third Ave. R. Co.*, 45 App. Div. (N. Y.) 586, 61 N. Y. Supp. 590, holding that the fact that a street car, when going through a crowded street, at a rate faster than a person can walk, comes to a stop suddenly, without any act of the gripman, does not of itself give rise to a presumption of negligence on the part of the car company, though a passenger is injured by falling from her seat, in consequence of the sudden stopping;

throwing a passenger from his seat to the floor and injuring him, it has been held that a presumption of negligence is raised.<sup>32</sup> In a case where it was shown that an injury to a passenger was caused by an act of the carrier in operating the instrumentalities employed in his business, it was held that there was a presumption of negligence which threw on the carrier the burden of showing that the injury was sustained without negligence on his part; and hence a verdict for injuries against a street railroad would not be reversed, because the evidence failed to show that the rate of speed of the car at the time of the accident was excessive, or that the excessive rate of speed or other negligence of defendant was the proximate cause of the injury, since it was sufficient that the evidence failed to show that it was not so.<sup>33</sup> Where a street car collided with a wagon in a public street, it was held proper, in an action for injuries to a passenger caused thereby, to refuse to instruct that plaintiff must establish negligence by a preponderance of the evidence, since, under the doctrine of *res ipsa loquitur*, proof of a collision raised a presumption of negligence on the part of the defendant requiring it to establish that the motorman was not in fact negligent.<sup>34</sup> In other cases, however, it is decided that the fact that a passenger on a car was injured as the result of a collision between the car and a vehicle has been held to raise no presumption of negligence on the part of the company.<sup>35</sup> The derailment of a street railway car, by which a passenger was injured, raises a presumption of the carrier's negligence.<sup>36</sup> When

also *Black v. Third Ave. R. Co.*, 2 App. Div. (N. Y.) 387, 37 N. Y. Supp. 830; *Nelson v. Lehigh Val. R. Co.*, 25 App. Div. (N. Y.) 535, 50 N. Y. Supp. 63.

**32.** *Redman v. Metropolitan St. Ry. Co.*, 185 Mo. 1, 3 St. Ry. Rep. 505, 84 S. W. 26.

**33.** *Bassett v. Los Angeles Trac. Co.*, 133 Cal. 1, 65 Pac. 470, 22 Am. & Eng. R. Cas. N. S. 5.

**34.** *Shay v. Camden & S. Ry. Co.*, 66 N. J. L. 334, 49 Atl. 547. See

also *Houghton v. Market St. Ry. Co.*, 1 Cal. App. 576, 4 St. Ry. Rep. 80, 82 Pac. 972.

**35.** *Chicago Union Trac. Co. v. Mee*, 218 Ill. 9, 4 St. Ry. Rep. 195, 75 N. E. 800; *Chicago City Ry. Co. v. Rood*, 163 Ill. 477, 45 N. E. 238, 54 Am. St. Rep. 478. Compare *Maher v. Metropolitan St. Ry. Co.*, 102 App. Div. (N. Y.) 517, 4 St. Ry. Rep. 848, 92 N. Y. Supp. 825.

**36.** *Spellman v. Lincoln Rap. T. Co.*, 36 Neb. 890, 55 N. W. 270, 20 L.

a collision occurs between the cars of two common carriers, resulting in an injury to a passenger of one of them, the rule *res ipsa loquitur* may be invoked by him against his own carrier.<sup>37</sup> The doctrine *res ipsa loquitur* applies to a collision between the cars of a street railway company in which a passenger sustains an injury, and where a passenger is thrown from her seat in the car by a collision with another car following on the same track, or is injured by a collision of such a car with a car on another track close to that of the street car company.<sup>38</sup> Inference of negligence in the management of a street car may be drawn from the driver's sudden stopping of the horses and inability to apply the brake for a necessary stop.<sup>39</sup> The sudden and unexpected release of a brake which had been set tight on a trolley car, causing the brake handle on

R. A. 316; Cincinnati St. Ry. Co. v. Kelsey, 9 Ohio C. C. 170, 2 Ohio Dec. 440; Elgin City R. Co. v. Wilson, 56 Ill. App. 364; Montgomery & E. R. Co. v. Mallette, 92 Ala. 209, 9 So. 363; Pollock v. Brooklyn, etc., R. Co., 15 N. Y. Supp. 189, 39 St. Rep. (N. Y.) 568; Stevenson v. Second Ave. R. Co., 35 App. Div. (N. Y.) 474, 54 N. Y. Supp. 815; Electric Car Co. v. Carson, 98 Ga. 652, 27 S. E. 156. Proof of the derailment of a street car causing injuries to a passenger justifies the conclusion, in the absence of evidence to the contrary, that it resulted either from improper construction, failure to keep in proper repair, or negligence in operation. Bergen Co. Trac. Co. v. Demarest, 62 N. J. L. 755, 42 Atl. 729; Edgerton v. New York, etc., R. Co., 39 N. Y. 227; Armstrong v. Metropolitan St. R. Co., 23 App. Div. (N. Y.) 137, 48 N. Y. Supp. 597; Braun v. Union Ry. Co., 115 App. Div. (N. Y.) 566, 5 St. Ry. Rep. 767, 100 N. Y. Supp. 1012.

**37.** Loudoun v. Eighth Ave. R. Co., 162 N. Y. 380, 56 N. E. 988. In case of a collision between the cars

of two separate street railway companies, the tracks of which intersect each other, the mere occurrence of the accident does not raise a presumption of negligence against either company. Falke v. Second Ave. R. Co., 38 App. Div. (N. Y.) 49, 55 N. Y. Supp. 984.

**38. Illinois.**—Elgin A. & S. Tr. Co. v. Wilson, 217 Ill. 47, 4 St. Ry. Rep. 193, 75 N. E. 436.

**Maryland.**—North Baltimore Pass. R. Co. v. Kaskell, 78 Md. 517, 28 Atl. 510.

**Missouri.**—Magrave v. St. Louis & Sub. Ry. Co., 183 Mo. 119, 3 St. Ry. Rep. 563, 81 S. W. 1158.

**New York.**—Kay v. Metropolitan St. R. Co., 163 N. Y. 447, 29 App. Div. (N. Y.) 466, 51 N. Y. Supp. 724; Anderson v. Brooklyn H. R. Co., 32 App. Div. (N. Y.) 266, 52 N. Y. Supp. 984.

**Pennsylvania.**—Abel v. Northampton Trac. Co., 212 Pa. St. 329, 4 St. Ry. Rep. 960, 61 Atl. 915.

**39.** Nolan v. Brooklyn City, etc., R. Co., 87 N. Y. 63.

the front platform to whirl around with a quick and violent motion, injuring a passenger boarding the car, raises a presumption of negligence on the part of the company.<sup>40</sup> A *prima facie* case of negligence is made out by testimony of the plaintiff that, being a passenger on defendant's street car, she indicated her desire to leave it, which stopped to enable her to do so, and that while she was in the act of leaving and before she could place herself safely on the ground, it started and threw her.<sup>41</sup> Where plaintiff was shocked by electricity as he took hold of the handhold of an electric car for the purpose of boarding it at a point where it had stopped to take on passengers, and he was badly injured, the circumstances surrounding the injury were held to be sufficient to raise the presumption of negligence on the part of the carrier.<sup>42</sup> Proof that injuries to a passenger on an electric street railway car were caused by electricity with which he came in contact after being thrown under the car, and that the car was so charged with electricity as to injure a person by contact with it, makes such a *prima facie* case of negligence as to cast the burden upon the railway company to show that the injuries were not caused either by electricity or through its careless use.<sup>43</sup> In an action against a street railway company where the plaintiff's evidence showed that his wagon was standing on one of defendant's tracks, and that in front of him were two cars, and that, as the second car moved up a grade, the trolley wheel slipped and the car slipped backward and struck the car back of it, when either the force of the col-

40. *Gilmore v. Brooklyn H. R. Co.*, 6 App. Div. (N. Y.) 117, 39 N. Y. Supp. 417.

41. *United Rys. & Elec. Co. v. Beidelman*, 95 Md. 480, 52 Atl. 913; *Consol. Trac. Co. v. Thalheimer*, 59 N. J. L. 474, 37 Atl. 132; *Scott v. Bergen Co. Trac. Co.*, 4 Chic. L. J. Wkly. 379, 43 Atl. 1060; *Armstrong v. Met. St. Ry. Co.*, 23 App. Div. (N. Y.) 137, 48 N. Y. Supp. 597; *North Chicago St. R. Co. v. Schwartz*, 82 Ill. App. 493.

42. *Dallas Consol. Elec. St. Ry. Co. v. Broadhurst*, 28 Tex. Civ. App. 630, 68 S. W. 315.

43. *Denver Tramway Co. v. Reid*, (Colo.) 35 Pac. 269, 4 Colo. App. 53. A *prima facie* case of negligence is established when a passenger on a street car sustains injuries by reason of escaping electricity. *Eickhof v. Chicago, etc., R. Co.*, 77 Ill. App. 196; *Burt v. Douglass Co. St. R. Co.*, 83 Wis. 229, 18 L. R. A. 479, 53 N. W. 447.

lision drove the rear car against the wagon, or the motorman of that car moved it backward to avoid a collision, it was held that the evidence raised a presumption of negligence on the part of the defendant, and made it incumbent on him to show due care.<sup>44</sup> Where the plaintiff, while walking across the street, was struck by a stick which flew from the hands of the defendant's car conductor, who was using it to free the trolley, which had caught in the frog at the junction of some overhead wires, it was held that the evidence warranted a finding of negligence on the part of the defendant. The court in its opinion stated the doctrine thus: "Apart from the possibility that the conductor might receive an electric shock sufficient to make him let go his hold, the jury were at liberty to say, from their experience as men of the world, that under such circumstances such an accident commonly does not happen unless the stick is carelessly handled; that it is in the power of the holder to see that he does not submit it to such a strain as to make it possible that it should be torn from his hands; and to infer from those general propositions of experience that there was negligence in the particular case."<sup>45</sup> In the case of an explosion upon a car a presumption of negligence has been held to arise.<sup>46</sup> But in California it has been decided that although a presumption of negligence arises against the defendant by proof that plaintiff was a passenger, that an explosion and flash of the controller took place, and that he was injured, and that although it became necessary by reason of this presumption for the defendant to meet and overcome it, the burden of proof does not shift from the plaintiff to the defendant, and it is proper to so charge

**44.** *Campbell v. Consol. Trac. Co.*, 201 Pa. St. 167, 50 Atl. 829.

**45.** *Manning v. West End St. R. Co.*, 166 Mass. 230, 44 N. E. 135; *Denver Consol. Elec. Co. v. Simpson*, 21 Colo. 371, 41 Pac. 499, 31 L. R. A. 566, holding that the jury may infer the unfitness of a switch stick from the fact that it flew from the hands of a conductor and injured a person on the street while it was being used

to free a trolley from a frog in the wires, as this may show that there was unnecessary danger in its use without India rubber gloves.

**46.** *Chicago Union Trac. Co. v. Newmiller*, 215 Ill. 383, 4 St. Ry. Rep. 165, 74 N. E. 410; *Brod v. St. Louis Transit Co.*, 115 Mo. App. 202, 5 St. Ry. Rep. 645, 91 S. W. 993; *German v. Brooklyn Heights R. Co.*, 107 App. Div. (N. Y.) 354, 4 St. Ry.

the jury, and also to charge that if the company introduces sufficient evidence simply to balance such presumption without overcoming it by a preponderance of evidence, the presumption is overcome.<sup>47</sup> Where plaintiff's horse was frightened by a loud and unusual noise proceeding from an electric car, and a volume of smoke issuing therefrom, and the horse ran away and plaintiff was injured, it was held that an instruction that if the horse was frightened by the noise and smoke, and such noise and smoke were not incident to the ordinary operation of the cars, it raises a presumption that such noise and smoke would not have been caused if defendant had used proper care in relation to the machinery of the car, and, in the absence of an explanation, the jury may infer that defendant was guilty of negligence, was properly given.<sup>48</sup> Evidence that plaintiff was injured while driving under defendant's elevated railroad, by an iron bar falling from such railroad, raises a presumption of negligence on the part of the defendant.<sup>49</sup> The unexplained breaking of an ear and guy used by an electric railway company raises a presumption of negli-

Rep. 848, 95 N. Y. Supp. 112; Firebaugh v. Seattle Elec. Co., 40 Wash. 658, 4 St. Ry. Rep. 1055, 82 Pac. 995.

See also section 287, *ante*, herein, as to explosions on cars.

47. *Patterson v. San Francisco & S. M. Elec. Ry. Co.*, 147 Cal. 178, 4 St. Ry. Rep. 44, 81 Pac. 531. The court said: "Exception is also taken to the latter part of the second instruction quoted above, where the jury were told that if the defendant introduced sufficient evidence to balance the presumption arising in favor of plaintiff from the proof of a *prima facie* case, without overcoming such presumption with a preponderance of evidence, the presumption was overcome. It is claimed by appellant that this presumption can only be overcome by a preponderance of the evidence. But this cannot be so.

Before a plaintiff is entitled to recover in any action, he must have a preponderance of evidence in his favor. If the evidence offered on the part of a defendant leaves the weight of evidence in a case equally balanced, it cannot exist that preponderance of evidence in plaintiff's favor which the law requires shall exist in order to warrant a recovery. To say that the plaintiff can recover when the weight of evidence is equally balanced, and there has been no preponderance on either side, is to say that the plaintiff can recover without a preponderance of evidence, which is, of course, legally impossible." *Per* LORIGAN, J.

48. *Richmond Ry. & Elec. Co. v. Hudgins*, 100 Va. 409, 41 S. E. 736.

49. *Hogan v. Manhattan R. Co.*, 149 N. Y. 23, 43 N. E. 403.

gence on the part of the company.<sup>50</sup> That an electric wire had become disconnected or detached from its fastening and hung down in a public alley so as to endanger public travel, is of itself *prima facie* evidence of negligence upon the part of the company maintaining it.<sup>51</sup> Proof of the falling of a trolley pole upon a person standing to get upon the car raises a presumption of negligence on the part of the company which will entitle such person to recover in the absence of evidence rebutting it.<sup>52</sup> And the falling of a trolley wire into the street raises a presumption of negligence on the part of the company which maintains such wire, which will create a liability for injuries sustained by a passerby, unless the conditions are satisfactorily explained so as to overcome such presumption of negligence.<sup>53</sup> Where the span wire of an electric railroad breaks and falling to the sidewalk strikes and burns a pedestrian, the doctrine of *res ipsa loquitur* applies, and there is a presumption of negligence on the defendant's part, which it is called upon to explain or rebut.<sup>54</sup> Where plaintiff's horse upon stepping upon a rail of defendant's electric railroad sprung into the air and fell upon the track where it died in a few minutes, and plaintiff in putting his hands on the hames of the harness received a severe shock, it was held to be error to dismiss the complaint for lack of proof of negligence or inaction or want of repair by defendant, since the facts were sufficient to justify the inference that the accident was due to the agency of the defendant, in the absence of evidence that would exonerate defendant.<sup>55</sup> The

**50.** *Ugla v. West End St. R. Co.*, 160 Mass. 351, 35 N. E. 1126.

**51.** *Denver Consol. E. Co. v. Simpson*, 21 Colo. 371, 31 L. R. A. 566, 41 Pac. 499.

**52.** *Cincinnati Trac. Co. v. Holzenkamp*, 74 Ohio St. 379, 5 St. Ry. Rep. 796, 78 N. E. 529.

**53.** *O'Flaherty v. Nassau Elec. R. Co.*, 34 App. Div. (N. Y.) 75, 7 Am. Electl. Cas. 535, 54 N. Y. Supp. 96; *affd.*, 59 N. E. 1128, 165 N. Y. 624.

But see *Kepner v. Harrisburg Trac. Co.*, 183 Pa. St. 24, 38 Atl. 416, hold-

ing that the mere breaking of a trolley wire does not raise a presumption of negligence against a traction company in an action for personal injuries resulting from the fright of a horse caused by the breaking of such wire.

**54.** *Jones v. Union Ry. Co.*, 18 App. Div. (N. Y.) 267, 46 N. Y. Supp. 321.

**55.** *Clarke v. Nassau Elec. R. Co.*, 9 App. Div. (N. Y.) 51, 41 N. Y. Supp. 78.

unexplained breaking down of a scaffold while an employee is thereon is presumptive evidence of the master's negligence.<sup>56</sup> In an action against a street railway company for personal injuries, evidence that plaintiff while somewhat intoxicated signaled a west-bound car, and to reach it crossed over the other track on which a car was approaching at a fast trot, about three hundred feet away; that as he took hold of the west-bound car he fell, and the east-bound car passed over his foot; without explanatory evidence by defendant, raises the presumption that there was negligence on the part of those in charge of the east-bound car which was the cause of the accident.<sup>57</sup>

§ 497. **Presumptions as to contributory negligence.** — The presumption of contributory negligence on the part of the person injured usually follows the rule as to the burden of proof. In jurisdictions where the burden is on the plaintiff to prove affirmatively his freedom from contributory negligence, the presumption, in the absence of proof, is that plaintiff was guilty of contributory negligence.<sup>58</sup> In those jurisdictions where the burden is not on the plaintiff to prove affirmatively his freedom from contributory negligence, but is on the defendant to prove such contributory negligence, if he would avail himself of that as a defense, the presumption, as a matter of course, in the absence of proof, is that plaintiff was not guilty of contributory negligence. The presumption thus raised in either case is rebutted when testimony to the contrary is presented sufficient to overcome such presumption.<sup>59</sup> In New York it has been held that, in an action to recover damages for an injury occurring through negligence, it is not to be

56. *Solarz v. Manhattan R. Co.*, 29 N. Y. Supp. 1123, 59 St. Rep. (N. Y.) 537, 8 Misc. Rep. (N. Y.) 856, 31 Abb. N. C. 426.

57. *Forwood v. Toronto*, 22 Ont. Rep. 351, 56 Am. & Eng. R. Cas. 445.

58. See cases cited from the States which hold the rule stated as to the burden of proof of contributory negligence, chap. 25.

Presumption of want of contributory negligence, see note, 4 St. Ry. Rep. 51.

59. See cases cited from the jurisdictions holding the rule stated as to the burden of proof as to contributory negligence, chap. 25. *Cox v. Wilmington City Ry. Co.*, (Del.) 53 Atl. 569.

presumed that plaintiff was free from fault;<sup>60</sup> and that no presumption exists, in the absence of proof, that an injured person was exercising due care at the time of the injury.<sup>61</sup> It has also been held in that State that, in the absence of proof of any circumstances importing negligence on the injured person's part, such negligence cannot be presumed.<sup>62</sup> And in a death case it was held that, in the absence of direct evidence of negligence on the part of the deceased, it may be presumed in his favor that he was desirous of preserving himself from injury.<sup>63</sup> In North Carolina, where the burden of proving freedom from contributory negligence is on the plaintiff, it is nevertheless held that the presumption is against contributory negligence, if there is no evidence of the fact, even in the absence of a statute making it a matter of affirmative defense.<sup>64</sup> The United States courts hold the same rule.<sup>65</sup> In other States where contributory negligence is a matter of affirmative defense it has been held that there are no presumptions against a plaintiff in an action for death or injuries resulting from negligence, of a want of due care and diligence, nor has he the burden of proving their exercise affirmatively;<sup>66</sup> that a woman will not be presumed to have been guilty of contributory negligence from the mere fact that she fell from the platform of a street car;<sup>67</sup> that it is not *prima facie* the fault of a passenger where he is injured by riding on the footboard of a trolley car;<sup>68</sup> that the presumption is that a person thrown from his load and fatally injured at a rail-

**60.** Warner v. N. Y. Cent. R. Co., 44 N. Y. 465.

**61.** Reynolds v. N. Y. Cent., etc., R. Co., 58 N. Y. 248.

**62.** Button v. Hudson River R. Co., 18 N. Y. 248. See Massoth v. Delaware & Hudson Canal Co., 64 N. Y. 524, holding that there is no presumption of law that a person about to cross a railroad track in a vehicle driven by another fails to look for a train.

**63.** Morrison v. N. Y. Cent., etc., R. Co., 63 N. Y. 643.

**64.** Norton v. North Carolina R. Co., 122 N. C. 910, 29 S. E. 886.

**65.** Texas & P. R. Co. v. Gentry, 160 U. S. 353; Baltimore & Ohio R. Co. v. Griffith, 159 U. S. 603; Grand Trunk R. Co. v. Ives, 144 U. S. 408.

**66.** Bromley v. Birmingham M. R. Co., (Ala.) 11 So. 341.

**67.** Metropolitan R. Co. v. Snashall, (D. C. App.) 22 Wash. L. Rep. 377.

**68.** Elliott v. Newport St. R. Co., (R. I.) 23 L. R. A. 208, 28 Atl. 338, 18 R. I. 707.

road crossing was exercising ordinary care and caution;<sup>69</sup> and that it must be presumed that a person who received injuries causing death, when no one saw the accident, was exercising due care, if there is no evidence to the contrary.<sup>70</sup>

**§ 498. Presumption arising from instinct of self-preservation. —**

There seems to be a conflict of authority as to whether it should be presumed, in the absence of evidence, that a traveler, who was killed at a street crossing, stopped, looked, and listened before crossing the track. In Kansas it has been held that "the very definition of ordinary care implies a presumption that it will usually be exercised. It is because people ordinarily, in crossing a railroad track, look and listen for their own protection, that a failure to do so is held to be negligence. It can never be presumed in the absence of evidence that a person fails to do that which people ordinarily do to avoid injury."<sup>71</sup> In an Illinois case the court said: "The rule in this State undoubtedly is that in suits for personal injuries caused by the negligence of another, the plaintiff must allege and prove that he was at the time in the exercise of due care, and, when the action is for causing the death of another, the burden is upon the administrator to show that the deceased exercised ordinary care to avoid the injury."<sup>72</sup> But in the latter class of cases and especially where no one saw the killing, direct testimony as to such care is not necessary, but it may be inferred from the circumstances of the case as shown by the evidence.<sup>73</sup> In a Pennsylvania case the court said: "The common law presumption is that every one does his duty until the contrary is proved, and in the absence of all evidence on the subject, the presumption is that the decedent observed the precautions

**69.** *Lillstrom v. Northern Pac. R. Co.*, (Minn.) 20 L. R. A. 587, 55 N. W. 624.

**70.** *Reichla v. Gruensfelder*, 52 Mo. App. 43.

**71.** *Chicago, R. I. & P. Ry. Co. v. Hinds*, 56 Kan. 758, 44 Pac. 993; *Dewald v. Kansas City, S. F. & G. R.*

*Co.*, 44 Kan. 587, 24 Pac. 1101. And see *McBride v. Northern Pacific R. Co.*, 19 Oreg. 64, 23 Pac. 814.

**72.** *Illinois Cent. R. Co. v. Nowicki*, 148 Ill. 29, 35 N. E. 358.

**73.** *Chicago & A. R. Co. v. Cary*, 115 Ill. 115, 3 N. E. 519.

which the law prescribed. In the case at bar, no witness was called who saw the occurrence. There is no evidence whatever whether in fact the decedent did stop, and look and listen. The presumption is that he did. Proof of that fact was no part of the plaintiff's case. The presumption is of fact merely, and may be rebutted, but we are without evidence on the subject.<sup>74</sup> In New York it has been held that the burden of proof is on the plaintiff to show that in approaching a railroad crossing he looked and listened for the approaching train. The court said: "In the case of a death by accident at a railroad crossing it must often happen that the circumstances immediately preceding it, and the acts and conduct of the deceased, are left in great obscurity. But the rules of law governing the right of recovery are the same as in other cases, although slighter evidence of compliance with the duty cast upon a plaintiff might be deemed sufficient than where the injured person was alive and competent to testify."<sup>75</sup> In an Iowa case the court said: "The origin of the rule in this State as to the presumption of action dictated by the instinct of self-preservation is due to the doctrine that the burden of showing affirmatively freedom from contributory negligence is on the plaintiff, and was introduced in order to avoid the evident injustice of such a doctrine in cases where there was no evidence whatever one way or the other as to the exercise of care by the injured party, and no such evidence was obtainable by the reason of the death of the party injured, and absence of any proof as to the circumstances attending the injury. The rule has no application where there is direct evidence of contributory negligence at the instant of the accident."<sup>76</sup> It has never been held that the presumption from the instinct of self-preservation constitutes affirmative proof of any specific act, or the exercise of any specific care.<sup>77</sup> In view of the fact that the rule generally applied to

**74.** *Schum v. Pennsylvania R. Co.*, 107 Pa. St. 8, 52 Am. Rep. 468.

**75.** *Rodrian v. New York, N. H. R. Co.*, 125 N. Y. 526, 26 N. E. 741.

**76.** *Ames v. Waterloo & C. F. Rapid Transit Co.*, 1 St. Ry. Rep. 199,

120 Iowa 640, 95 N. W. 161; *Bell v. Incorporated Town of Clarion*, 113 Iowa 126, 84 N. W. 962.

**77.** *Ames v. Waterloo & C. F. Rapid Transit Co.*, 120 Iowa 640, 95 N. W. 161, 1 St. Ry. Rep. 199; *Metz*

the conduct of persons crossing the tracks of steam railroads that the omission to "stop, look, and listen" before crossing the tracks is negligence, as matter of law, is only applicable to street railways where the attendant circumstances are such that reasonable care and prudence would dictate such precautions, and the mandatory duty to look and listen is not applied with the same rigidity to pedestrians crossing street railroad tracks at the intersecting streets, it being the duty of the railroad company to have its cars under control as they approach such crossings, it would seem, that where there is no evidence upon the question as to whether a person who was killed at a street railroad crossing looked and listened before crossing the track, that the presumption would be even stronger in favor of his having taken the necessary precautions to prevent injury. The presumption that the decedent who was killed at a crossing performed his legal duty of stopping, looking, and listening is rebutted when it appears from the evidence that he stopped on the track immediately in front of an approaching locomotive.<sup>78</sup> If a person about to cross a track could have seen an approaching train if he had stopped and looked, it will be presumed, in the absence of contradictory evidence, that he did not look, or that, if he did look, he did not heed.<sup>79</sup>

v. St. Paul City R. Co., 88 Minn. 48, 92 N. W. 502; McGee v. Consol. St. R. Co., 102 Mich. 107, 60 N. W. 293; Watkins v. Union Traction Co., 194 Pa. St. 564, 45 Atl. 321; Nugent v. Philadelphia Traction Co., 181 Pa. St. 160, 37 Atl. 206.

**78.** Pennsylvania R. Co. v. Moody, 126 Pa. St. 244, 17 Atl. 590; Belle-

fontaine R. Co. v. Schneider, 24 Ohio St. 670.

**79.** Pennsylvania R. Co. v. Righter, 42 N. J. L. 180; Myers v. Baltimore & O. R. Co., 150 Pa. St. 386, 24 Atl. 747; Miller v. Truesdale, 56 Minn. 274, 57 N. W. 661; Kallmerten v. Cowen, 111 Fed. 297, 49 C. C. A. 746.

## CHAPTER XXIV.

## Burden of Proof.

SECTION 499. The burden of proving negligence.

500. The burden of proving negligence continued.

501. The burden of proof as to contributory negligence.

§ 499. The burden of proving negligence. — The burden of proof is upon the plaintiff, as a general rule, to prove, in an action to recover damages for a personal injury sustained, the negligence of the railroad company, and, in the absence of any presumption of negligence on the part of the defendant, the plaintiff must prove by a fair preponderance of the evidence facts which show that the negligence of the defendant was the proximate cause of the injury.<sup>1</sup> The burden is always on the plaintiff to show by a preponderance of the evidence that the defendant committed a

1. *United States*. — *Crandall v. Goodrich Transp. Co.*, 16 Fed. 75.

*Connecticut*. — *Button v. Frink*, 51 Conn. 92.

*Delaware*. — *Cox v. Wilmington City Ry. Co.*, 4 Penn. (Del.) 162, 53 Atl. 569.

*Illinois*. — *C. C. & Q. C. R. Co. v. Troesch*, 68 Ill. 545.

*Iowa*. — *Willoughby v. Chicago & N. W. R. Co.*, 37 Iowa 432.

*Massachusetts*. — *Halloran v. Worcester Consol. St. Ry. Co.*, 192 Mass. 104, 5 St. Ry. Rep. 449, 78 N. E. 381; *Gorham v. Milford, A. & W. St. Ry. Co.*, 189 Mass. 275, 4 St. Ry. Rep. 471, 75 N. E. 634; *Allyn v. Boston & Albany R. Co.*, 105 Mass. 77.

*Michigan*. — *Mynning v. Detroit, L. & N. R. Co.*, 67 Mich. 67, 35 N. W. 811; *Brown v. Congress & Baker St. Ry. Co.*, 49 Mich. 153, 13 N. W. 499; *Chicago & N. W. R. Co. v. Smith*, 46 Mich. 504, 9 N. W. 830.

*Missouri*. — *Woas v. St. Louis Transit Co.*, 198 Mo. 664, 5 St. Ry. Rep. 564, 96 S. W. 1017; *Kaiser v. St. Louis Transit Co.*, 108 Mo. App. 708, 3 St. Ry. Rep. 555, 84 S. W. 199.

*New York*. — *Searles v. Manhattan R. Co.*, 101 N. Y. 661, 5 N. E. 66, 5 N. E. 66, 25 Am. & Eng. R. Cas. 358; *Seybolt v. New York, etc., R. Co.*, 95 N. Y. 562, 47 Am. Rep. 75, 13 Am. & Eng. R. Cas. 162; *Cordell v. New York Cent. & H. R. R. Co.*, 75 N. Y. 330; *Caldwell v. New Jersey Steamboat Co.*, 47 N. Y. 291; *Curtis v. Rochester & S. R. Co.*, 18 N. Y. 524; *Holbrook v. Utica & S. R. Co.*, 12 N. Y. 236; *McCaig v. Erie R. Co.*, 8 Hun 599; *Oysterbank v. Gardner*, 49 N. Y. Super. Ct. 263.

*Pennsylvania*. — *Allen v. Willard*, 57 Pa. St. 374; *Pennsylvania & R. R. Co. v. Spearen*, 47 Pa. St. 300; *Herschberger v. Lynch*, 11 Atl. 642.

*Texas*. — *El Paso Elec. Ry. Co. v.*

negligent act and that it was the proximate cause of the injury. The two facts must co-exist and be established by the clear weight of the evidence before a case of actionable negligence is made out.<sup>2</sup> Having done this, the plaintiff is entitled to recover, except where the rule of law is maintained that plaintiff also has the burden of proving his own freedom from contributory negligence.<sup>3</sup> But the plaintiff is not bound to make out his case beyond all reasonable doubt, or so as to exclude every other possible theory.<sup>4</sup> It is necessary for plaintiff to establish by a preponderance of evidence, circumstances from which it may fairly be inferred that there is a reasonable probability that the accident resulted from the want of ordinary care or negligence of the defendant, or that it could not have been produced except by the operation of abnormal causes.<sup>5</sup> The plaintiff must prove some-

Alderete, — Tex. Civ. App. —, 3 St. Ry. Rep. 853, 81 S. W. 1246.

See note 4 St. Ry. Rep. 45.

2. Crenshaw v. Asheville & B. St. Ry. & Tr. Co., 144 N. C. 314, 6 St. Ry. Rep. 832, 56 S. E. 945, citing Brewster v. Elizabeth City, 137 N. C. 392, 49 S. E. 885. The court said: "This kind of proof, which must be forthcoming in order to establish the issues in favor of the plaintiff, was considered recently by us in Byrd v. Express Co., 139 N. C. 273, 51 S. E. 851, where we said: 'There must be legal evidence of the fact in issue, and not merely such as raises a suspicion or conjecture in regard to it. The plaintiff must do more than show the possible liability of the defendant for the injury. He must go further, and offer at least some evidence which reasonably tends to prove every fact essential to his success.'"

To entitle a plaintiff to recovery he must not only show that he has sustained an injury but that the defendant has been guilty of some neg-

ligence which produced such injury. Cumberland & W. Elec. Ry. Co. v. Thompson, 102 Md. 193, 4 St. Ry. Rep. 390, 62 Atl. 243, citing Benedict v. Potts, 88 Md. 52, 40 Atl. 1067, 41 L. R. A. 478.

3. The burden of proving the absence of contributory negligence is placed upon the plaintiff in a number of States. See section 501, herein, and cases there cited.

4. Seybolt v. New York, L. E. & W. R. Co., 95 N. Y. 562; Whitney v. Clifford, 57 Wis. 156, 14 N. W. 927; Welch v. Jugenheimer, 56 Iowa 11, 41 Am. Rep. 77, 8 N. W. 673; Elliot v. Van Buren, 33 Mich. 49, 20 Am. Rep. 668; Stratton v. Central City Horse R. Co., 95 Ill. 525, 1 Am. & Eng. R. Cas. 115.

5. Hayes v. Michigan Cent. R. Co., 111 U. S. 228, 241, 4 S. Ct. 369, 15 Am. & Eng. R. Cas. 394; Philadelphia v. Stebbing, 62 Md. 504, 19 Am. & Eng. R. Cas. 36; Seybolt v. New York, L. E. & W. R. Co., 95 N. Y. 562.

thing which warrants the inference of negligence on the defendant's part, and not leave his case upon facts just as consistent with care and prudence as with the opposite, or so that there may not appear reasonable grounds upon which to impute negligence to the defendant.<sup>6</sup> It is not necessary to prove every act of negligence charged, or every material fact alleged by the plaintiff, but the jury need only to be satisfied by a preponderance of the evidence of the negligence of the defendant.<sup>7</sup> But where the plaintiff chooses in his petition to allege specific acts of negligence, the rule of law places the burden of proving such specific negligence upon the plaintiff and a recovery, if at all, must be had upon the specific negligence pleaded.<sup>8</sup> When plaintiff has introduced evidence sufficient, as a matter of law, to charge the defendant with negligence, or has shown facts sufficient to create a presumption of negligence, the burden of proof shifts to the defendant.<sup>9</sup> In Nebraska it is decided that the rule that the burden of proof upon the issue of negligence does not shift during the progress of the trial, but rests throughout upon the party alleging the negligence, is based upon the better reason.<sup>10</sup>

6. *Hayes v. Forty-Second St., etc.*, R. Co., 97 N. Y. 259; *McCaig v. Erie R. Co.*, 8 Hun (N. Y.) 599.

7. *Johnson v. Agricultural Ins. Co.*, 25 Hun (N. Y.) 251; *Pittsburg, C. C. & St. L. Co. v. Gray*, 59 N. E. (Ind. App.) 1000; *Seybolt v. New York, L. E. & W. R. Co.*, 95 N. Y. 562.

8. *Roscoe v. Metropolitan St. Ry. Co.*, 202 Mo. 576, 5 St. Ry. Rep. 631, 101 S. W. 32.

9. *Pennsylvania Canal Co. v. Bentley*, 66 Pa. St. 30; *Missouri Pac. R. Co. v. Foreman*, 73 Tex. 311, 11 S. W. 326; *Bischoff v. Schultz*, 5 N. Y. Super. Ct. 757; *Giles v. Diamond State Iron Co.*, 8 Atl. (Del.) 368. In an action against a street railway company for injuries to a passenger arising from one car escaping from

control of its driver sliding down an incline, and colliding with another car at the bottom, it is error to instruct that the burden is on defendant to prove such facts as will demonstrate its freedom from negligence; since, while the presumption arising from such accident is that the company was negligent, this presumption is merely an aid to plaintiff in sustaining the burden of proof, which remains on him throughout the case. *Kay v. Met. St. Ry. Co.*, 163 N. Y. 447, 57 N. E. 751; revg. 62 N. Y. Supp. 1139, 29 App. Div. (N. Y.) 466.

10. *Lincoln Trac. Co. v. Shepherd*, 74 Neb. 369, 4 St. Ry. Rep. 677, 107 N. W. 764, 104 N. W. 882; *Omaha St. Ry. Co. v. Boesen*, 74 Neb. 764, 4 St. Ry. Rep. 669, 105 N. W. 303.

§ 500. **The burden of proving negligence — Continued.** — In an action by a passenger to recover for an injury the burden of proof is upon the plaintiff to show that the injury was caused by the act of the carrier either in maintaining or operating the instrumentalities employed in its business. If this is shown by a fair preponderance of evidence then there is a presumption of negligence which throws upon the carrier the burden of showing the absence of negligence on its part.<sup>11</sup> Where the plaintiff is a passenger on a street car, a *prima facie* case of negligence is made out by showing the happening of the accident during the course of transportation; and, if the injury was caused by apparatus wholly under its control, furnished and applied by it, a presumption of negligence on the part of the company is raised, and the burden is on the latter to prove itself not guilty of negligence.<sup>12</sup> But where the agencies which, united, caused an injury to a passenger were not all within the control of the carrier, the burden of proof is on the plaintiff to show the negligence of the defendant which caused the injury, since in such case negligence could not be inferred from the mere fact of injury.<sup>13</sup> In an action for personal injuries sustained by plaintiff by his being thrown from

11. *French v. Pacific Electric Ry. Co.*, 1 Cal. App. 401, 4 St. Ry. Rep. 79, 82 Pac. 395. See also *Cody v. Market St. Ry. Co.*, 148 Cal. 90, 4 St. Ry. Rep. 81, 82 Pac. 666.

In an action for damages for an injury while being transported by a street railway company, the burden is on the plaintiff to prove that he was a passenger, was injured, the extent of his injuries and circumstances of such a character as to impute negligence. *Lincoln Trac. Co. v. Webb*, 103 Neb. 136, 3 St. Ry. Rep. 588, 102 N. W. 258.

The burden of proof is on the plaintiff to prove by a preponderance of evidence that the injuries were received by him while being transported by the defendant at or about the time

and place alleged, and that the negligence of the company was the proximate cause of such injuries and that by reason thereof the plaintiff has sustained damages and the amount of such damages. *Lincoln Trac. Co. v. Shepherd*, 74 Neb. 369, 4 St. Ry. Rep. 682, 104 N. W. 882, 107 N. W. 764.

12. *Chicago City Ry. Co. v. Morse*, 98 Ill. App. 662; *affd.*, 197 Ill. 327, 64 N. E. 304; *Brimmer v. Illinois Cent. R. Co.*, 101 Ill. App. 198; *Davis v. Paducah Ry. & Light Co.*, 24 Ky. L. Rep. 135, 68 S. W. 140; *Chicago City Ry. Co. v. Carroll*, 102 Ill. App. 202.

13. *Elwood v. Chicago City Ry. Co.*, 90 Ill. App. 397.

a street car on its jumping the track, though plaintiff made a *prima facie* case by proof that the car was going at a "pretty good rate," and that the accident happened at a point where there were side tracks leading into the car stable, the burden nevertheless remained on him, when the proof was all in, to show negligence on the part of the defendant.<sup>14</sup> A common carrier can only rebut the presumption that an injury to its passengers from an accident to its conveyance was due to its negligence, by showing that the accident occurred from circumstances against which human foresight and prudence could not guard.<sup>15</sup> The burden of proof that a nonobvious risk of an employment was in a given case assumed by the servant rests on the carrier.<sup>16</sup> Where plaintiff negligently placed himself in a dangerous position on one of defendant's tracks, without looking for an approaching car, and was struck by one coming from the rear, the burden was on him, in order to recover, to show by reasonable inference that the motorman was negligently indifferent to his safety; and the fact of the collision, or of plaintiff's apparent inattention to signals, or his delay in heeding them, so long as that delay was not obviously dangerous, were not sufficient in themselves to create such a reasonable inference of negligence.<sup>17</sup>

§ 501. The burden of proof as to contributory negligence. — The courts of the several States hold conflicting views upon the question as to whether the burden of proving contributory negligence, or its absence, is upon the plaintiff or the defendant. In a number of the States it is held that, inasmuch as the plaintiff cannot recover unless the injured party was in the exercise of ordinary care at the time of the injury, he must prove affirmatively that

14. *Hollahan v. Metropolitan St. Ry. Co.*, 73 App. Div. (N. Y.) 164, 76 N. Y. Supp. 751.

15. *Bowen v. N. Y. Cent. R. Co.*, 18 N. Y. 408.

16. *Dowd v. New York, Ont. &*

*West. Ry. Co.*, 170 N. Y. 459, 63 N. E. 541.

17. *Bennett v. Metropolitan St. Ry. Co.*, 122 Mo. App. 703, 6 St. Rep. Rep. 33, 99 S. W. 480.

the injury occurred without negligence on his part.<sup>18</sup> And in some of these States it is held that he must both allege and prove his freedom from contributory negligence.<sup>19</sup> In New York the rule is that, in all actions to recover damages resulting from the negligence of a street railroad, the burden of proof is on the plaintiff to show affirmatively by a preponderance of evidence the absence of negligence on the part of the injured person contributing proximately to the injury, as well as the existence of negligence on the part of the defendant.<sup>20</sup> For instance, it is held that in an action for negligence causing death, the burden is on the plaintiff to show, either by direct evidence or the drift of

**18. Connecticut.**—*Park v. O'Brien*, 29 Conn. 339.

*Indiana.*—*Young v. Citizens' St. Ry. Co.*, 148 Ind. 54, 44 N. E. 927, 47 N. E. 142; *Sirk v. Marion St. Ry. Co.*, 11 Ind. App. 680, 39 N. E. 421.

*Iowa.*—*Bonce v. Dubuque St. Ry. Co.*, 53 Iowa 278.

*Massachusetts.*—*Cox v. South Shore & B. St. Ry. Co.*, 182 Mass. 497, 65 N. E. 823; *Taylor v. Carew Mfg. Co.*, 143 Mass. 470, 10 N. E. 308.

*Michigan.*—*Mynning v. Detroit L. & N. R. Co.*, 67 Mich. 677, 35 N. W. 811.

*Mississippi.*—*City of Vicksburg v. Hennessy*, 54 Miss. 391.

*New York.*—*Warner v. N. Y. Cent. R. Co.*, 44 N. Y. 465; *Kuhnen v. Union R. Co.*, 10 App. Div. 195, 41 N. Y. Supp. 714.

*North Carolina.*—*Owens v. Richmond & D. R. Co.*, 88 N. C. 502.

**19. Illinois.**—*Galena, etc., R. Co. v. Fay*, 16 Ill. 558, 63 Am. Dec. 323.

*Indiana.*—*Cincinnati, etc., R. Co. v. Butler*, 103 Ind. 31, 2 N. E. 138, 23 Am. & Eng. R. Cas. 262; *Louisville, etc., R. Co. v. Orr*, 84 Ind. 50.

*Iowa.*—*Slossen v. Burlington*, 55 Iowa 294, 7 Am. & Eng. R. Cas. 509;

*Greenleaf v. Illinois, etc., R. Co.*, 29 Iowa 14, 4 Am. Rep. 181.

*Louisiana.*—*Moore v. Shreveport*, 3 La. Ann. 645.

*Maine.*—*Kennard v. Burton*, 25 Me. 39.

*Massachusetts.*—*Hinckley v. Cape Cod, etc., R. Co.*, 120 Mass. 257.

**20. Button v. Hudson Riverr R. Co.**, 18 N. Y. 248; *Winterfield v. Second Ave. R. Co.*, 20 N. Y. Supp. 801, 49 St. Rep. (N. Y.) 435; *Leavitt's Code of Neg.*, p. 254. But see *Keegan v. Western R. Co.*, 8 N. Y. 115. *Examine Bowbace v. Interurban St. Ry. Co.*, 188 N. Y. 288, 5 St. Ry. Rep. 771, 80 N. E. 913. It is not enough to prove facts from which either the conclusion of negligence or the absence of negligence may with equal fairness be drawn, but the burden is upon the plaintiff to satisfy the jury that there was no contributory negligence on the part of the injured person. *Hart v. Hudson Riv. Br. Co.*, 84 N. Y. 56. The rule is the same in *Illinois*, *North Chicago St. Ry. Co. v. Louis*, 138 Ill. 9, 27 N. E. (Ill.) 451; *revg. on other grounds* 35 Ill. App. 477.

surrounding circumstances, that the deceased was without fault in approaching defendant's track, though there were no eyewitnesses, and the precise cause and manner of the accident are unknown.<sup>21</sup> But in this State it is held that less evidence is required by a personal representative as to contributory negligence of a decedent than would be required in case of a surviving person, but in such case some evidence must be given from which the jury can find the intestate did exercise the care required by law.<sup>22</sup> In Georgia it is held that, if it is shown that an employee for whose death an action is brought has disobeyed the orders of his superior, the burden is upon the plaintiff to show that such disobedience did not contribute in any degree to the injury.<sup>23</sup> In Maine, in an action for an injury caused by a collision at a railroad crossing, between the train and plaintiff driving in a carriage, plaintiff must show affirmatively the company's negligence and his own want of contributory negligence.<sup>24</sup> The Indiana courts maintain the necessity of both an averment and proof of the injured person's freedom from negligence.<sup>25</sup> But, in those States where the burden of proof is upon the plaintiff to show that the injured person was free from fault, the law does not always require positive proof of due care and diligence on the part of the plaintiff. Under certain circumstances it may be assumed that he observed ordinary care for his safety.<sup>26</sup> The absence of any fault on the part of the person injured may be inferred from the circumstances of the case, and the ordinary habits, conduct, and motives of men.<sup>27</sup> It is proper to consider the natural instinct of self-preservation and the known disposition of men to save themselves from harm, which raises a presumption of want of contributory negligence.<sup>28</sup> But a bare pre-

**21.** *Tolman v. Syracuse, etc., R. Co.*, 98 N. Y. 198, 50 Am. Rep. 649.

**22.** *Axelrod v. New York City Ry. Co.*, 109 App. Div. (N. Y.) 87, 4 St. Ry. Rep. 865, 95 N. Y. Supp. 1072.

**23.** *Prather v. Richmond & D. R. Co.*, 80 Ga. 427, 9 S. E. 530.

**24.** *Lesan v. Maine Cent. R. Co.*, 77 Me. 85.

**25.** *Cincinnati, H. & D. R. Co. v. McMullen*, 117 Ind. 439, 20 N. E. 287.

**26.** *Missouri Furnace Co. v. Abend*, 107 Ill. 44, 47 Am. Rep. 425.

**27.** *Johnson v. Hudson River R. Co.*, 20 N. Y. 65; *Texas & New Orleans Ry. Co. v. Crowder*, 63 Tex. 502.

**28.** *Denver Tramway Co. v. Reid*, 4 Colo. App. 53, 35 Pac. 269.

sumption is not sufficient, there must be some tangible proof or the attending circumstances must be such as to show that the party was not in default.<sup>29</sup> In some cases it has been held that there is a presumption that he was not using ordinary care.<sup>30</sup> It has been held by the United States Supreme Court, however, that, irrespective of statute law on the subject, the burden of proof as to plaintiff's freedom from contributory negligence does not rest upon the plaintiff; that plaintiff may establish the negligence of the defendant, his injury in consequence thereof, and his case is made out; if there are circumstances which convict him of concurrent negligence, the defendant must prove them and thus defeat the action.<sup>31</sup> The question of contributory negligence is thus made a defense in the federal courts, the burden of supporting which is upon the defendant.<sup>32</sup> This rule that the burden of proof of contributory negligence is upon the defendant is not varied by the fact that the plaintiff alleges that he was in the exercise of due care, or by any other state of the pleadings.<sup>33</sup> And in a recent case in California it is decided

**29.** *Squire v. Central Park, N. & E. R. Co.*, 36 N. Y. Supp. 459; *Button v. Hudson River R. Co.*, 18 N. Y. 248. Though it is unnecessary, in an action for a death caused by negligence, to produce direct evidence of a lack of contributory negligence on the part of deceased, it is necessary to show facts and circumstances from which it may be reasonably inferred that he was exercising proper care. *Lorickio v. Brooklyn H. R. Co.*, 44 App. Div. (N. Y.) 628, 60 N. Y. Supp. 247. The presumption that men will naturally avoid rather than court or defy danger is not sufficient to overcome the necessity for some proof of the absence of contributory negligence by one killed by a train at a street crossing. *Pittsburgh, etc., R. Co. v. Bennett*, (Ind. App.) 35 N. E. 1033.

**30.** *Indiana, B. & W. Ry. Co. v. Greene*, 106 Ind. 279, 25 Am. & Eng. R. Cas. 322, 55 Am. Rep. 736; *State v. Maine, etc., R. Co.*, 76 Me. 357, 19 Am. & Eng. R. Cas. 312, 49 Am. Rep. 622.

**31.** *Washington, etc., R. Co. v. Gladmon*, 82 U. S. (15 Wall.) 401, 21 L. ed. 114; *Indianapolis & St. L. R. Co. v. Horst*, 93 U. S. 298, 23 L. ed. 900; *Hough v. Ry. Co.*, 100 U. S. 226, 25 L. ed. 618; *Coasting Co. v. Tolson*, 139 U. S. 557, 35 L. ed. 274, 11 Sup. Ct. Rep. 655.

**32.** *Chesapeake & O. R. Co. v. Steele*, 84 Fed. 93, 54 U. S. App. 550, 29 C. C. A. 81 (C. C. A. 6th C.); *Hayes v. Northern Pac. R. Co.*, 74 Fed. 279 (C. C. A., 7th C.).

**33.** *Fitchburg R. Co. v. Nichols*, 50 U. S. App. 297, 85 Fed. 945, 29 C. C. A. 500 (C. C. A., 1st C.); *Denver &*

that the question of contributory negligence is nearly always a matter for the jury, and the burden of proving it rests upon the defendant, unless the undisputed facts, shown by the plaintiff's own evidence, clearly disclose that the complaining party has not exercised such care as men of prudence usually exercise in positions of like exposure and danger, in which case it becomes a question of law for the court.<sup>34</sup> The rule that there is a presumption of ordinary care in favor of plaintiff and defendant both, or no presumption of negligence as against either party, except such as arises from the facts proved, and that it devolves upon the plaintiff to prove a want of ordinary care, or negligence, on the part of the defendant, and on the defendant to prove a want of ordinary care, or negligence, on the part of the plaintiff, contributing to his injury, is held by the courts in a majority of the States and by most text-writers.<sup>35</sup> If the plaintiff's case has

**R. G. R. Co. v. Ryan**, 17 Colo. 98, 28 Pac. 79. Nor is plaintiff's burden of showing that he was not guilty of contributory negligence, in those jurisdictions where he is required to make such proof, shifted by the fact that defendant unnecessarily pleaded plaintiff's contributory negligence. **Hawes v. Burlington, Cedar Rapids & N. Ry. Co.**, 64 Iowa 315, 20 N. W. 717.

**34. Bealy v. Fresno City Ry. Co.**, 9 Cal. App. 417, 6 St. Ry. Rep. 148, 99 Pac. 400, citing **Glascok v. C. P. R. Co.**, 73 Cal. 137, 14 Pac. 518; **Franklin v. S. C. M. R. Co.**, 85 Cal. 63, 24 Pac. 723; **Green v. P. L. Co.**, 130 Cal. 435, 62 Pac. 747; **Hodges v. S. P. Co.**, 3 Cal. App. 310, 86 Pac. 620; **Dinnigan v. Peterson**, 3 Cal. App. 764, 87 Pac. 218; **Williams v. S. F. & N. W. R. Co.**, 6 Cal. App. 715, 93 Pac. 122; **Herbert v. S. P. Co.**, 121 Cal. 227, 53 Pac. 651; **Carr v. Eell River, etc., R. Co.**, 98 Cal. 368, 33 Pac. 213, 21 L. R. A. 354.

**35. Mobile & Montgomery R. Co. v. Jay**, 65 Ala. 113; **Hobson v. New Mexico & A. R. Co.**, 11 Pac. (Ariz.) 545, holding that when the evidence for plaintiff does not show want of care, the onus is on defendant to prove his want of care; **Thompson v. Duncan**, 76 Ala. 334; **Missouri Pac. Ry. Co. v. McCally**, 41 Kan. 639, 21 Pac. 574; **Fulks v. St. L. & S. F. Ry. Co.**, 111 Mo. 335, 19 S. W. 818; **Crumpley v. Hannibal & St. J. R. Co.**, 111 Mo. 152, 19 S. W. 820; **Anderson v. Chicago, B. & Q. R. Co.**, 35 Neb. 95, 52 N. W. 840; **San Antonio & A. Pass. Ry. Co. v. Bennett**, 76 Tex. 151, 13 S. W. 319; **Spurrier v. Front St. Cable Ry. Co.**, 3 Wash. 659, 29 Pac. 346; **Waterman v. Chicago & A. R. Co.**, 82 Wis. 613, 52 N. W. 247; **W. U. T. Co. v. Eyser**, 2 Colo. 154; **Texas, etc., R. Co. v. Orr**, 46 Ark. 194; **Sanders v. Reister**, 1 Dak. 172, 46 N. W. 685; **Hopkins v. Utah N. Ry. Co.**, 2 Idaho 280, 13 Pac. 345; **Kansas City, etc., R. Co. v. Philli-**

shown that under the circumstances the defendant owed him a duty, and that duty has not been performed, and that the injury has resulted therefrom, the obligation is then upon the defendant to prove plaintiff's contributory negligence as a defense to the action.<sup>36</sup> In other words, when the plaintiff has shown the negligence of the defendant as a proximate cause sufficient to account for the injury, upon evidence which clearly makes a *prima facie*

bert, 25 Kan. 586; Paducah, etc., R. Co. v. Hoehl, 12 Bush (Ky.) 47; Frech v. Philadelphia, etc., R. Co., 39 Md. 576; Davis v. Kansas City Ry. Co., 46 Mo. App. 189; Higby v. Gilmer, 3 Mont. 97; Lincoln v. Walker, 18 Neb. 247, 20 N. W. 114; Cox v. Norfolk, etc., R. Co., 123 N. C. 613, 31 S. E. 851; Gram v. Northern, etc., R. Co., 1 N. Dak. 260, 46 N. W. 974; Cassidy v. Angell, 12 R. I. 449, 34 Am. Rep. 691; Smith v. Chicago, etc., Ry. Co., 4 S. Dak. 80, 55 N. W. 720; Reddon v. Union Pac. Ry. Co., 5 Utah 355, 15 Pac. 265; Balt., etc., R. Co. v. Whittington, 30 Gratt. (Va.) 809; Norfolk, etc., R. Co. v. Burge, 84 Va. 70, 4 S. E. 25; Northern, etc., R. Co. v. O'Brien, 1 Wash. 607, 21 Pac. 35; Sheff v. Huntington, 16 W. Va. 317; Hulehan v. Green Bay, etc., R. Co., 68 Wis. 527, 32 N. W. 532; McDougal v. Central R. Co., 63 Cal. 431; Kentucky Cent. R. Co. v. Thomas, 79 Ky. 160; Hocum v. Weitherick, 22 Minn. 152; Smith v. Eastern R. Co., 35 N. H. 356; N. J. Express Co. v. Nichols, 33 N. J. L. 434; Baltimore, etc., R. Co. v. Whitacre, 35 Ohio St. 627; Grant v. Baker, 12 Oreg. 329; Bradwell v. Pittsb. West End Pass. Ry. Co., 139 Pa. St. 404, 20 Atl. 1046; Carter v. Columbia, etc., R. Co., 19 S. C. 20, 45 Am. Rep. 754; Hill v. New Haven, 37 Vt. 501; Indianapolis St. Ry. Co. v. Robinson, 157 Ind. 414, 61 N. E. 936. As to the proof re-

quired of plaintiff when the burden is on the defendant, it was said in Lincoln v. Walker, 18 Neb. 247, 20 N. W. 114: "In view of the conflict in the authorities, we are compelled to adopt such rule as may seem most consonant with justice. This being so, there certainly is no presumption that the plaintiff was negligent. We therefore hold the rule to be that, if the plaintiff can prove his case without showing contributory negligence, it is a matter of defense to be proved by the defendant." Stevens v. Missouri Pac. R. Co., 67 Mo. App. 356; Omaha St. R. Co. v. Martin, 48 Neb. 65, 4 Am. & Eng. R. Cas. N. S. 1, 66 N. W. 1007; McDonald v. Montgomery St. R. Co., 110 Ala. 161, 20 So. 317.

**36.** Oldfield v. New York & H. R. Co., 14 N. Y. 310; Johnson v. Hudson River R. Co., 20 N. Y. 65; Button v. Hudson River R. Co., 18 N. Y. 248; Wilds v. Hudson River R. Co., 24 N. Y. 230; Washington, etc., R. Co. v. Gladmon, 15 Wall. (U. S.) 401; Buesching v. Gas Light Co., 73 Mo. 229; Pennsylvania R. Co. v. Weber, 76 Pa. St. 157; Kansas City, etc., R. Co. v. Flynn, 78 Mo. 195; Abbett v. Chicago, etc., R. Co., 30 Minn. 482; McDougal v. Central R. Co., 63 Cal. 431; Dallas & W. R. Co. v. Spicker, 61 Tex. 427; P. C. & St. L. R. Co. v. Wright, 80 Ind. 182, 5 Am. & Eng. R. Cas. 628.

case, without showing fault on his own part or anything raising a presumption thereof, it devolves upon defendant to show plaintiff's contributory negligence affirmatively in order to prevent a recovery.<sup>37</sup> But if plaintiff's testimony raises a presumption of contributory negligence on his part, the burden rests upon him to remove that presumption.<sup>38</sup> It is a rule of universal application that if plaintiff's declarations or evidence establishes his own contributory negligence, it bars his recovery, no matter where the burden of proof rests.<sup>39</sup>

**37.** *Milwaukee, etc., R. Co. v. Hunter*, 11 Wis. 160, 78 Am. Dec. 699; *Johnson v. Hudson River R. Co.*, 20 N. Y. 65; *Lincoln v. Walker*, 18 Neb. 247, 20 N. W. 114; *Hoyt v. Hudson*, 41 Wis. 105, 22 Am. Rep. 714; *Prideaux v. Mineral Point*, 43 Wis. 513, 28 Am. Rep. 558; *Dallas, etc., R. Co. v. Spicker*, 61 Tex. 427, where the court said: "It would seem that a plaintiff would be entitled in every case of this character to recover upon evidence which clearly makes a *prima facie* case, unless such case be rebutted by testimony offered by himself or by defendant."

**38.** *Baltimore & Ohio R. Co. v.*

*Whitacre*, 35 Ohio St. 627; *Hobson v. New Mexico & A. R. Co.*, (Ariz.) 11 Pac. 545; *Cassidy v. Angell*, 12 R. I. 449, 34 Am. Rep. 691; *San Antonio & A. Pass. R. Co. v. Bennett*, 76 Tex. 151, 13 S. W. 319.

**39.** *Railroad Co. v. Gladmon*, 15 Wall. (U. S.) 401; *Freck v. Phila.*, *supra*; *McQuillen v. Cent. Pac. R. Co.*, 50 Cal. 7; *Lincoln v. Walker*, 18 Neb. 247, 20 N. W. 114; *Boss v. Providence & W. R. Co.*, 21 Am. & Eng. R. Cas. 364, 15 R. I. 149, 1 Atl. 9; *New Jersey Ex. Co. v. Nichols*, 33 N. J. L. 434; *Winship v. Enfield*, 42 N. H. 197; *Baltimore, etc., R. Co. v. Whitacre*, 35 Ohio St. 627.

## CHAPTER XXV.

## Damages.

- SECTION 502. Elements and measure of damages for personal injuries.  
 503. Pain and suffering — Future consequences.  
 504. Loss of earnings — Impairment of earning capacity.  
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## § 502. Elements and measure of damages for personal injuries. —

A person injured in a street railroad accident through the negligence of the company is entitled to damages which will reasonably compensate him for his injuries, including loss of time and wages, necessary expenditures for medical attendance and medicines, past and future mental and physical suffering, and loss of earning power or capacity resulting from any permanent injury.<sup>1</sup>

1. *Adams v. Wilmington & N. Elec. Ry. Co.*, 3 Penn. (Del.) 512, 52 Atl. 264; *Stanley v. Cedar Rapids & M. C. Ry. Co.*, 119 Iowa 526, 93 N. W. 489, future pain and suffering and loss of time constitute a proper element of damages; *Campbell v. Los Angeles Traction Co.*, 137 Cal. 565, 70 Pac. 624, where plaintiff was suffering from disease, and such injury hastened the development and aggravated the same, she was entitled to recover for such increased injury; *Hansberger v. Sedalia Elec. Ry., L. & P. Co.*, 82 Mo. App. 566, plaintiff

is entitled to recover for all damages, present and future, believed to be the necessary results of the injury; *Cicero & P. St. Ry. Co. v. Brown*, 89 Ill. App. 318; *North Chicago St. Ry. Co. v. Duebner*, 83 Ill. App. 602, mental pain, not directly or necessarily connected with the physical pain, is not a proper element to be considered by the jury in assessing damages; *Omaha St. R. Co. v. Emminger*, 57 Neb. 240, 77 N. W. 675, 12 Am. & Eng. Corp. Cas. N. S. 188; *Chicago City R. Co. v. Anderson*, 80 Ill. App. 71, 4 Chic. L. J. Wkly. 41, mental

In an action for injuries, in estimating plaintiff's damages it is proper to consider the effect of the injury upon the plaintiff, the use of his body and limbs, and his ability to pursue any ordinary trade or calling, if these will be affected by the injury complained of, and also the bodily pain he sustained, if any, and all damages, if any, which the jury find from the evidence to be the direct and necessary result of the injury complained of.<sup>2</sup> In an action for

pain caused by the contemplation of a maimed body and the humiliation of going through life in a crippled condition is too remote; *West Chicago St. R. Co. v. James*, 69 Ill. App. 609; *Chicago City R. Co. v. Taylor*, 170 Ill. 49, 48 N. E. 831, 9 Am. & Eng. R. Cas. N. S. 513; affg. 69 Ill. App. 613, physical or mental suffering attending or arising from an injury may be regarded as part of it, but injured feelings which may arise in the mind from the accident resulting in the injury, not being a part of the pain attending it, cannot be regarded as an element of damage; *Chicago City R. Co. v. Canevin*, 72 Ill. App. 81, 2 Chic. L. J. Wkly. 600; *Purcell v. St. Paul City R. Co.*, 48 Minn. 134, 50 N. W. 1034, 16 L. R. A. 281; *San Antonio & A. P. R. Co. v. Keller*, 11 Tex. Civ. App. 569, 32 S. W. 847. The impairment of the nervous system as the direct result of a nervous shock received in an accident is not an independent element of the damages, in addition to pain and suffering, and a claim for compensation based thereon is too remote and speculative. *Washington & G. R. Co. v. Dashiell*, 7 App. D. C. 507, 24 Wash. L. Rep. 40; *Demann v. Eighth Ave. R. Co.*, 10 Misc. Rep. (N. Y.) 191, 62 St. Rep. (N. Y.) 476, 30 N. Y. Supp. 926; *Van De Venter v. Chicago City Ry. Co.*, 26 Fed. 32; *Crank v. Forty-Second St., etc., Ry.*

*Co.*, 53 Hun (N. Y.) 425, 6 N. Y. Supp. 229; *Bishop v. St. Paul City Ry. Co.*, 48 Minn. 26, 50 N. W. 928.

2. *Chicago City Ry. Co. v. Fennimore*, 199 Ill. 9, 64 N. E. 985; *Metropolitan St. Ry. Co. v. Hudson*, (U. S. C. C. A., N. Y.) 51 C. C. A. 283, 113 Fed. 449, damages indirectly resulting from the injury may also be recoverable; *West Chicago St. R. Co. v. Maday*, 88 Ill. App. 49; affd., 188 Ill. 308, 58 N. E. 933, the jury may consider all the facts and circumstances in evidence, the nature and extent of the plaintiff's injuries, his bodily pain and suffering resulting therefrom, the permanent disability, the money necessarily paid by him in and about endeavoring to be cured, and any future pain and suffering or future inability to labor or transact business that the jury may believe from the evidence he will sustain as the necessary and direct result of the injuries; *Leslie v. Jackson & S. Trac. Co.*, 1 St. Ry. Rep. 409, 134 Mich. 518, 96 N. W. 580, the plaintiff is only entitled to such damages on account of decreased earning power as in accordance with his former physical condition are just, and it is proper to disregard the depreciation thereof if the evidence shows that it existed prior to the accident, arising out of the previous physical defects of the plaintiff.

personal injuries sustained by a passenger in alighting from a car on account of the negligence of the company, an instruction to the jury to consider the pain suffered by the plaintiff in consequence of such injuries in estimating the damages is proper.<sup>3</sup> Where a passenger was invited by a conductor to alight and she could not by the exercise of ordinary care see that it was a point short of her estimation, damages may be recovered for illness brought about by exposure to the weather after leaving the car, though she has the burden of showing that the illness was brought about by such exposure.<sup>4</sup> The recovery for medical services must be confined to reasonable sums of money expended or incurred in endeavoring to be healed.<sup>5</sup> Damages may be recovered for an injury which aggravates a previously diseased physical condition.<sup>6</sup> Upon the question of damages evidence is admissible of plaintiff's mental condition before the injury and also continuously from and after the injury to the time of the trial.<sup>7</sup> Only nominal damages can be recovered for the death of a brother incapable of supporting himself by reason of habitual drunkenness, under a statute providing for recovery, for the benefit of the widow and next of kin, of a fair and just compensation with ref-

**3.** *Colorado & Cripple Creek Ry. Co. v. Petit*, 37 Colo. 326, 5 St. Ry. Rep. 58, 86 Pac. 121.

**4.** *Georgia Ry. & Elec. Co. v. McAllister*, 126 Ga. 447, 5 St. Ry. Rep. 128, 54 S. E. 957.

**5.** *Fleming v. Kansas City & B. R. Co.*, 89 Mo. App. 129; *Chicago City Ry. Co. v. Wall*, 93 Ill. App. 411, the proper measure of services rendered by a physician as an element of damages is the usual and reasonable charges of the profession generally and not the usual charges of the particular physician who is testifying; *Omaha St. R. Co. v. Em-minger*, 57 Neb. 240, 12 Am. & Eng. Corp. Cas. N. S. 188, 77 N. W. 675, necessary medical services may be recovered where the plaintiff is liable

for them although they have not been paid for; *Lammerman v. Detroit Citizens' St. R. Co.*, 112 Mich. 602, 71 N. W. 153; *Morris v. Grand Ave. R. Co.*, 144 Mo. 500, 46 S. W. 170; *San Antonio St. R. Co. v. Muth*, 7 Tex. Civ. App. 443, 27 S. W. 752; *Cuming v. Brooklyn City R. Co.*, 109 N. Y. 95, 16 N. E. 65; *Gumb v. Twenty-Third St. R. Co.*, 114 N. Y. 411, 21 N. E. 993; *McNair v. Manhattan R. Co.*, 123 N. Y. 664, 34 St. Rep. (N. Y.) 1010, 26 N. E. 750.

**6.** *Green v. Houston Electric Co.*, 40 Tex. Civ. App. 260, 4 St. Ry. Rep. 1044, 89 S. W. 442.

**7.** *Chicago Union Trac. Co. v. Lawrence*, 211 Ill. 373, 3 St. Ry. Rep. 142, 71 N. E. 1024.

erence to the pecuniary injuries resulting to them from a death by negligence not exceeding \$5,000.<sup>8</sup> When the jury determines from the evidence that there is a permanent injury they may include in their verdict damages for perspective pain and suffering to the time of plaintiff's death.<sup>9</sup> In estimating the damages for a permanent injury expectancy of life should be based on mortality tables figuring from the date of the trial and not from the date of the injury.<sup>10</sup> But Carlisle tables should not be admitted in evidence when the injuries are not of themselves permanent and there is no evidence in the case to show that they will be permanent.<sup>11</sup> It is the duty of one suffering personal injuries through the negligence of another to seek for and submit to such surgical operation as will bring relief, where the operation is such as a person of ordinary prudence and regard for himself would submit to, but he is not bound to submit to an operation comparatively new, and as to the best method of performing which the professional mind is not absolutely at rest.<sup>12</sup>

§ 503. **Pain and suffering — Future consequences.** — The amount of compensation for pain and suffering and the future consequences reasonably certain to result from a personal injury are not capable of exact proofs, and the jury, in estimating them, may consider the facts and circumstances proved, in connection with their knowledge, observation, and experience in the affairs of life.<sup>13</sup> In order to authorize a recovery for future conse-

8. *North Chicago St. R. Co. v. Brodie*, 156 Ill. 317, 40 N. E. 942; revg. 57 Ill. App. 564.

9. *Howell v. Lansing City Elec. Ry. Co.*, 136 Mich. 432, 3 St. Ry. Rep. 443, 99 N. W. 406.

10. *Howell v. Lansing City Elec. Ry. Co.*, 136 Mich. 432, 3 St. Ry. Rep. 443, 99 N. W. 406.

11. *MacGregor v. Rhode Island Co.*, 27 R. I. 85, 3 St. Ry. Rep. 772, 60 Atl. 761.

12. *Mattis v. Phila. Trac. Co.*, 6 Pa. Dist. Rep. 94, 19 Pa. Co. Ct. 106.

13. *North Chicago St. R. Co. v. Fitzgibbons*, 180 Ill. 466, 54 N. E. 483; affg. 79 Ill. App. 632; *Washington & G. R. Co. v. Patterson*, 9 App. D. C. 423, 25 Wash. L. Rep. 36, compensation can be had so far as it is susceptible of an estimate in money for the loss and damages caused by the negligence of another, including not only expenses incurred for medical attendance and a reasonable sum for pain and suffering, but also a fair recompense for the loss of what would have been otherwise earned in

quences of an injury, it must appear reasonably certain from the evidence that they will occur.<sup>14</sup> And an instruction that "if the jury find that plaintiff is entitled to recover in this case, in arriving at the amount of damages which should be awarded to him, you are at liberty to take into consideration the pain, if any, which you may believe from the evidence he has endured, and may endure in the future, by reason of said injuries; and also the injury to his hand and back, if any, which the jury may believe from the evidence he has suffered or will suffer, as a result of said injuries and allow him such sum by way of damages as will fairly compensate him for said injury and pain," has been held to be erroneous in that under it the jury might award damages for pain which was merely possible, whereas the recovery should be for what the evidence showed was reasonably certain to continue.<sup>15</sup> So the jury should be restricted in awarding damages for future pain and suffering to such as are reasonably

the trade or business of the person injured.

**14.** *Hoyt v. Met. St. Ry. Co.*, 73 App. Div. (N. Y.) 249, 76 N. Y. Supp. 832; *De Wardener v. Met. St. Ry. Co.*, 1 App. Div. (N. Y.) 240, 37 N. Y. Supp. 133; *Strohm v. New York, L. E. & W. R. Co.*, 96 N. Y. 305; *Laidlaw v. Dage*, 158 N. Y. 73, 52 N. E. 679; *McKenna v. Brooklyn H. R. Co.*, 41 App. Div. (N. Y.) 255, 58 N. Y. Supp. 462. Physical pain or mental anguish plaintiff might suffer in the future being speculative damages are not allowable. *Hall v. Cedar Rapids & M. C. R. Co.*, 115 Iowa 8, 87 N. W. 739. Evidence that an injury is permanent, and that further pain to body and mind is reasonably certain, is sufficient basis for compensation for future suffering. *Smiley v. St. Louis & H. Ry. Co.*, 160 Mo. 629, 61 S. W. 667; *Hamilton v.*

*Great Falls St. R. Co.*, 17 Mont. 334, 351, 43 Pac. 713, 42 Pac. 860.

**Damages for future loss of services** and future pain and suffering may be recovered for an injury by which one leg becomes shorter than the other, thus reducing the earning capacity and occasional pain and anguish are still experienced at the time of trial. *Geiler v. Manhattan R. Co.*, 11 Misc. Rep. (N. Y.) 413, 65 St. Rep. (N. Y.) 437, 32 N. Y. Supp. 254; *Aaron v. Second Ave. R. Co.*, 2 Daly (N. Y.) 127; *Elsas v. Second Ave. R. Co.*, 56 Hun (N. Y.) 161, 9 N. Y. Supp. 210.

The future damages must be reasonably certain to justify an award therefor. *O'Keefe v. United Rys. Co.*, 124 Mo. App. 613, 5 St. Ry. Rep. 666, 101 S. W. 1144.

**15.** *Haas v. St. Louis & S. Ry. Co.*, 111 Mo. App. 706, 5 St. Ry. Rep. 614, 90 S. W. 1155.

certain to result from the injury, and there should be no allowance for speculative, contingent or merely probable results.<sup>16</sup>

**§ 504. Loss of earnings — Impairment of earning capacity.** — Compensation for the value of the injured person's time during the period of disability and for the impairment of his ability to make money is proper to be allowed, although he was not actually earning anything at the time of the injury.<sup>17</sup> And the defendant was held not to be prejudiced by the court's refusal to charge that had deceased lived his earning capacity would have decreased with advancing years.<sup>18</sup> And it has been held proper to instruct the jury, in an action for injury to a passenger, that they may consider plaintiff's diminished capacity for earning money, if any, and on account thereof make such allowance as might be fair and just for any loss they might believe from the evidence he had sustained in the past by reason thereof and for any loss they might believe he would sustain in his future earnings by reason of his diminished earning capacity.<sup>19</sup> But compensation for loss of earning capacity must be restricted to those earnings derived entirely from personal skill and service.<sup>20</sup> Where an

**16.** *Waddell v. Metropolitan St. Ry. Co.*, 113 Mo. App. 680, 5 St. Ry. Rep. 655, 88 S. W. 765.

There can be no recovery for future suffering unless it is reasonably certain to result from the injuries. *Chicago & Milwaukee Elec. Ry. Co. v. Ulrich*, 213 Ill. 170, 3 St. Ry. Rep. 141, 72 N. E. 815.

**17.** *Storrs v. Los Angeles Trac. Co.*, 134 Cal. 91, 66 Pac. 72, so held where the plaintiff was seventy-five years old, and up to the time of the injury had been active and in good health, and engaged in business of his own, which was somewhat extensive and diversified, and had held positions of trust in several financial and other corporations, which capacity to transact business was seriously

impaired; *Brachfeld v. Third Ave. R. Co.*, 30 Misc. Rep. (N. Y.) 425, 62 N. Y. Supp. 470, no recovery can be had for plaintiff's expenses in employing a substitute in his business unless pleaded; *North Chicago St. R. Co. v. Zeiger*, 78 Ill. App. 463.

**18.** *Rideout v. Winnebago Traction Co.*, 123 Wis. 297, 3 St. Ry. Rep. 943, 101 N. W. 672.

**19.** *Reynolds v. St. Louis Transit Co.*, 189 Mo. 408, 4 St. Ry. Rep. 649, 88 S. W. 50.

**20.** *Pryor v. Met. St. Ry. Co.*, 85 Mo. App. 367.

**A recovery for personal injuries properly includes** loss of future earnings resulting from the injuries, where the plaintiff's previous earnings in her occupation — custom corset-

injured person was rendered unconscious, in which condition he remained until his death upon the succeeding day, it was held that, notwithstanding the unconsciousness of the intestate until his death, the action for the injury survived, and the prospective damages recoverable were to be measured by loss of earnings for the period during which the evidence fairly showed that the intestate would have lived but for the injury.<sup>21</sup> Where a physician had been injured by a collision with a street car in such a way as to interfere with the carrying on of his practice for several months, it was decided that the court did not err in permitting him to testify as to his earnings for the corresponding months for the previous year.<sup>22</sup> While an injury may cause a loss of time or interfere with the business, work, trade or profession of the party injured, resulting in his damage, such damage is to be regarded as special and is provable only when specifically averred in the complaint.<sup>23</sup>

§ 505. **Fright — Mental suffering and anguish.** — No recovery can be had for injuries sustained by fright occasioned by the negligence of another, when there is no immediate personal injury.<sup>24</sup> But injuries produced by fright form a basis of recovery when accompanied by the harm occasioned otherwise, as, for

making — afford a basis for the computation of earning power. *Pill v. Brooklyn H. R. Co.*, 6 Misc. Rep. (N. Y.) 267, 57 St. Rep. (N. Y.) 783, 27 N. Y. Supp. 230.

**21.** *Oliver v. Houghton Co. St. Ry. Co.*, 1 St. Ry. Rep. 401, 134 Mich. 367, 96 N. W. 434, 10 Detroit Leg. N. 477.

**22.** *Sluder v. St. Louis Transit Co.*, 189 Mo. 107, 4 St. Ry. Rep. 581, 88 S. W. 648. The court said: "It was not guess work but actual knowledge to which he was testifying. It was not remote but the value of his profession to him for the immediate months during which he was disabled,

and we agree with him that the best evidence was the actual earnings of the months in which he was injured." *Per GANTT, J.*

**23.** *Union Trac. Co. v. Sullivan*, 38 Ind. App. 513, 4 St. Ry. Rep. 240, 76 N. E. 116.

**24.** *Mitchell v. Rochester Ry. Co.*, 151 N. Y. 107, 34 L. R. A. 781, 45 N. E. 354, 56 Am. St. Rep. 604; *Consol. Trac. Co. v. Lambertson*, 59 N. J. L. (30 Vroom) 297, 36 Atl. 100; *affd.*, 60 N. J. L. 452, 38 Atl. 683, 684, that one is in and carried along for some distance in a wagon struck by a street car going at a great speed constitutes a physical in-

example, by the fall, where a pedestrian is thrown violently to the ground and injured by an electric shock communicated from a broken trolley wire which fell upon him.<sup>25</sup> The mental agitation and disorder of plaintiff naturally and proximately resulting from an actionable wrong, accompanied by personal injury, committed by defendant, are proper for the consideration of the jury in fixing the damages.<sup>26</sup> The rule that damages are not al-

lenged which informed the jury that they might take into consideration pain and anguish of mind consequent on such injury, but the instruction was sustained. It is there said (page 320): 'It is the mind that either feels or takes cognizance of physical pain, and hence there is mental anguish or suffering inseparable from bodily injury. \* \* \* The mental anguish which would not be proper to be considered is where it is not connected with the bodily injury, but was caused by some mental conception not arising from the physical injury.' In *Hannibal & St. Joseph R. Co. v. Martin*, 111 Ill. 219, the jury were instructed that 'in determining the amount of damages the plaintiff is entitled to recover in this case, if any, the jury have a right to, and they should, take into consideration all the facts and circumstances in evidence before them, the nature and extent of the plaintiff's physical injuries, if any, testified about by the witnesses in this case, her suffering in body and mind, if any, resulting from such injuries, and also such prospective suffering and loss of health, if any, as the jury may believe from all the evidence \* \* \* she has sustained or will sustain by reason of such injuries.' The court held the instruction correct and said (page 232): 'Where suffering in body and mind is the result of in-

jury which will allow him to recover damages resulting from incidental fright.

25. *O'Flaherty v. Nassau Elec. R. Co.*, 34 App. Div. (N. Y.) 74, 54 N. Y. Supp. 96, 58 Alb. L. J. 347.

26. *McDermott v. Severe*, 202 U. S. 599, 5 St. Ry. Rep. 116, 26 Sup. Ct. 709; *Consol. Trac. Co. v. Lambertson*, 60 N. J. L. 457, 10 Am. & Eng. R. Cas. N. S. 753, 38 Atl. 684; *affg.* 59 N. J. L. (30 Vroom) 297, 36 Atl. 100, distinguishing *Mitchell v. Rochester R. Co.*, 151 N. Y. 107, 34 L. R. A. 781, 45 N. E. 354. Damages for mental suffering may be recovered although they are not specially pleaded or proved. *McCoy v. Milwaukee St. R. Co.*, 88 Wis. 56, 59 N. W. 453; *Illinois & St. L. Ry. Co. v. Stables*, 62 Ill. 313; *Johnson v. Wells, Fargo & Co.*, 6 Nev. 224.

**But in an action by or for the benefit of the next of kin** the measure of damages is the pecuniary loss suffered by the parties entitled to the sum recovered, without any allowance for sorrow or distress of mind. *McKeever v. Market St. R. Co.*, 59 Cal. 294; *Chicago City Ry. Co. v. Gilliam*, 27 Ill. App. 386.

In a case in Illinois it is said: "The question as to a recovery for physical and mental pain is not entirely new in this court. In *Indianapolis & St. Louis R. Co. v. Stables*, 62 Ill. 313, an instruction was chal-

lenged which informed the jury that they might take into consideration pain and anguish of mind consequent on such injury, but the instruction was sustained. It is there said (page 320): 'It is the mind that either feels or takes cognizance of physical pain, and hence there is mental anguish or suffering inseparable from bodily injury. \* \* \* The mental anguish which would not be proper to be considered is where it is not connected with the bodily injury, but was caused by some mental conception not arising from the physical injury.' In *Hannibal & St. Joseph R. Co. v. Martin*, 111 Ill. 219, the jury were instructed that 'in determining the amount of damages the plaintiff is entitled to recover in this case, if any, the jury have a right to, and they should, take into consideration all the facts and circumstances in evidence before them, the nature and extent of the plaintiff's physical injuries, if any, testified about by the witnesses in this case, her suffering in body and mind, if any, resulting from such injuries, and also such prospective suffering and loss of health, if any, as the jury may believe from all the evidence \* \* \* she has sustained or will sustain by reason of such injuries.' The court held the instruction correct and said (page 232): 'Where suffering in body and mind is the result of in-

lowed for mental suffering and humiliation, resulting from an act of negligence, does not apply where an actionable wrong has been committed, and the mental suffering was only one of the elements to be considered in determining the amount of compensatory damages; and difficulty in estimating the amount of damages resulting therefrom cannot defeat the right to have the same considered in fixing the sum which may be recovered for the wrongful act. Thus it has been so held where plaintiff was unlawfully ejected

juries caused by negligence, it is proper to take them into consideration in estimating the amount of damages.' See also *City of Chicago v. McLean*, 133 Ill. 148, 24 N. E. 527, 8 L. R. A. 765, where the *Stables* case, *supra*, was cited and approved; also *Central Ry. Co. v. Serfass*, 153 Ill. 379, 39 N. E. 119. In a case of this character we are inclined to the opinion that the rule established by the cases cited is that any physical and mental suffering attending or arising from the injury received may be regarded as a part of the injury, and, as such, a proper subject of compensation; but injured feelings which might arise in the mind resulting from the injury, not being a part of the pain naturally attending the injury, cannot be regarded as an element of damage." *Clark's Street Railway Accident Law* (2d ed.) 433; 8 Am. & Eng. Enc. of Law (2d ed.) 658; *Chicago City Ry. Co. v. Taylor*, 170 Ill. 49, 57, 48 N. E. 831, 834, quoted in *Denver City Tramway Co. v. Martin*, 44 Colo. 324, 6 St. Ry. Rep. 605, 98 Pac. 836.

In Georgia it is decided that the damages recoverable for a tort are restricted to injuries to person, property, and reputation. The court in this case said it was bound by the decision in *Chapman v. Western*

*Union Tel. Co.*, 88 Ga. 763, 4 Am. Elec. Cas. 686, 15 S. E. 901, 17 L. R. A. 430, 30 Am. St. Rep. 183, while it did not approve of it, saying: "We think that the peace of mind, the feelings, and the happiness of every one should be guarded by giving recovery of damages for mental anguish or suffering produced either intentionally or negligently." This statement was made in a decision in an action brought to recover damages for an insult alleged to have been given by a conductor on a street car to a passenger, in which case it was held error to charge the jury that if the words and actions of the defendant's servant were such as to insult and annoy the plaintiff and to worry and humiliate her she would be entitled to damages. *Georgia Ry. & Elec. Co. v. Baker*, 1 Ga. App. 832, 5 St. Ry. Rep. 146, 58 S. E. 88.

It is well settled that a party may recover for mental pain and fright connected with or resulting from an injury. *Denver City Tramway Co. v. Martin*, 44 Colo. 324, 6 St. Ry. Rep. 605, 98 Pac. 836.

**Fright** may be considered as an element of damages when associated with actual bodily injuries. *Lofink v. Interborough Rapid Trans. Co.*, 102 App. Div. (N. Y.) 275, 3 St. Ry. Rep. 711, 92 N. Y. Supp. 386.

from defendant's car, without violence, but to his great mortification and humiliation.<sup>27</sup> The element of pain and mental anguish may be considered by the jury in estimating the damages in an action for the ejection of a passenger where it appears that such ejection was accompanied with malice and oppression and that his life or great bodily harm was threatened, even though such pain and anguish were not connected with a physical injury.<sup>28</sup> Damages for mental suffering may be allowed a woman for an insult offered her by an employee in the mistaken belief that she was a lewd woman and malice need not be proven.<sup>29</sup> And humiliation and injured feelings may be considered by the jury in estimating the damages to be awarded one to whom insulting words have been used by a conductor of the car.<sup>30</sup>

**§ 506. Damages — Ejection of passenger.** — A passenger who has been unlawfully ejected and compelled to walk by reason thereof a long distance, to her injury, may recover for the direct result attributable to the necessity of traveling on foot, if she exercised due care.<sup>31</sup> And where, in an action for the wrongful ejection of a passenger who, having paid his fare, refused to pay another fare, the court instructed that if the jury found for the plaintiff they should allow him the fare which he had paid and such a reasonable sum, not exceeding the amount claimed, as would compensate him for any humiliation or degradation they might believe from the evidence he suffered by reason of being ejected from defendant's car, it was held to be no error.<sup>32</sup> A railroad company is liable in damages for an injury to the feel-

**27.** *Indiana Ry. Co. v. Orr*, 41 Ind. App. 426, 6 St. Ry. Rep. 594, 84 N. E. 32.

**28.** *Carmony v. St. Louis Transit Co.*, 122 Mo. App. 338, 5 St. Ry. Rep. 536, 99 S. W. 495.

See also section 506 as to ejection of passenger.

**29.** *Davis v. Tacoma Ry. & P. Co.*, 35 Wash. 203, 3 St. Ry. Rep. 906, 77 Pac. 209.

**30.** *Gillespie v. Brooklyn Heights R. Co.*, 178 N. Y. 347, 3 St. Ry. Rep. 694, 70 N. E. 857.

**31.** *Spicer v. Lynn & B. R. Co.*, 149 Mass. 207, 21 N. E. 363.

**32.** *Camden Interstate Ry. Co. v. Frazier*, 30 Ky. L. Rep. 186, 5 St. Ry. Rep. 317, 97 S. W. 776.

ings and sensibilities of a passenger, caused by his wrongful expulsion from one of its cars, though such passenger may not have received any physical injury.<sup>33</sup> And where the wrongful act, such as the ejection of a person from a car, is accompanied by offensive, insulting and humiliating conduct, or where the act is wilful and inhuman, fright, mental suffering and anguish may be considered as elements of damages.<sup>34</sup> In an action for the ejection of a passenger and assault on him, it is held that evidence of the use of insulting and vulgar language to the conductor in the presence of ladies is not to be considered in mitigation of compensatory damages for an assault and battery following the ejection,<sup>35</sup> Where the complaint alleged that the conductor unlawfully threatened to eject the plaintiff and did unlawfully and wrongfully beat and assault her by reason whereof she was injured, it was held that the action was simply for assault and battery and that a charge to the jury that, although no assault and battery had been committed upon the plaintiff, yet that "if you find this plaintiff was illegally ejected or compelled to get off of this car, then she is entitled to such damages as you feel the evidence warrants" was erroneous, as a plaintiff was not entitled to plead one cause of action and recover upon another.<sup>36</sup>

§ 507. **Injury to married woman.** — A husband may recover as damages for personal injuries to his wife, for loss of her services and society, and also the cost and expenses incurred by him for medical attendance and nursing.<sup>37</sup> And in an action by a hus-

**33.** *Mabry v. City Elec. Ry. Co.*, 116 Ga. 624, 59 L. R. A. 590, 42 S. E. 1025; *Harless v. Southwest Missouri Elec. Ry. Co.*, 123 Mo. App. 22, 5 St. Ry. Rep. 606, 99 S. W. 793.

**34.** *Harless v. Southwest Missouri Elec. Ry. Co.*, 123 Mo. App. 22, 5 St. Ry. Rep. 606, 99 S. W. 793, so holding where a child, six years of age, who had been put on a car by a young woman, did not have the necessary fare and was ejected on the

outskirts of a town on a cold day, such conduct being declared to be inhuman.

**35.** *Mahoning Valley Ry. Co. v. De Pascale*, 70 Ohio St. 179, 3 St. Ry. Rep. 737, 71 N. E. 633.

**36.** *Ray v. United Traction Co.*, 96 App. Div. (N. Y.) 48, 3 St. Ry. Rep. 715, 89 N. Y. Supp. 49.

**37.** *Washington & G. R. Co. v. Hickey*, 12 App. D. C. 269, 26 Wash. L. Rep. 198. The damages may in-

band for loss of his wife's support, evidence has been held admissible as to what had been the profits from a boarding house kept by the wife during the year before the accident and the year after the accident where they could be estimated with reasonable certainty, even though no itemized accounts of the costs and receipts of the business had been kept.<sup>38</sup> A wife is entitled to recover reasonable\* compensation for her physical injury and for pain and suffering endured, but cannot recover for loss of time or personal services, which belong to her husband<sup>39</sup> nor for moneys expended for medicines or nursing.<sup>40</sup> But a married woman who has not lived with her husband for several years and has supported herself during such time, may recover for expenses incurred for medical services.<sup>41</sup> Damages may be recovered for

clude the value of the services which she customarily rendered in caring for and training their children, although the damages sustained by the children themselves are not recoverable in the action, *Redfield v. Oakland Consol. St. R. Co.*, 112 Cal. 220, 43 Pac. 1117; *Ainley v. Manhattan R. Co.*, 47 Hun (N. Y.) 206; *Citizens' St. R. Co. v. Twiname*, 121 Ind. 375, 7 L. R. A. 352, 23 N. E. 159; *Hawkins v. Front St. Cable R. Co.*, 3 Wash. 592, 16 L. R. A. 808, 28 Pac. 1020; *Butler v. Manhattan R. Co.*, 4 Misc. Rep. (N. Y.) 401, 24 N. Y. Supp. 142; *Met. St. R. Co. v. Johnson*, 91 Ga. 466, 18 S. E. 816; *Butler v. Manhattan R. Co.*, 143 N. Y. 417, 38 N. E. 454, 26 L. R. A. 46, the term "service" in actions of this character include any pecuniary injury suffered by the husband from having been deprived of the aid, comfort, and society of his wife, or which may be reasonably expected to result in the future, including charges and expenses incurred, or which he may be put to in consequence of the wrong; but the loss of prospective offspring

by miscarriage cannot be considered as an element of damages. *Tunnicliffe v. Bay Cities Consol. R. Co.*, 102 Mich. 624, 61 N. W. 11; *Osgood v. Lynn & B. R. Co.*, 130 Mass. 492.

**38.** *Comstock v. Connecticut Ry. & L. Co.*, 77 Conn. 65, 3 St. Ry. Rep. 54, 58 Atl. 465.

**39.** *Bading v. Milwaukee Elec. Ry. & L. Co.*, 105 Wis. 480, 81 N. W. 861; *West Chicago St. R. Co. v. Carr*, 67 Ill. App. 530, she may recover for her loss of time and expenses in endeavoring to be cured, as she is personally responsible under the Illinois statute for such expenses and is entitled to her own earnings.

**A married woman may recover** as part of her damages the amount of the diminution of her earning capacity. *Hamilton v. Great Falls St. R. Co.*, 17 Mont. 351, 334; 43 Pac. 713, 42 Pac. 860. See *Met. St. R. Co. v. Johnson*, 90 Ga. 500, 16 S. E. 49.

**40.** *State v. City of Detroit*, 113 Mich. 643, 72 N. W. 8, 4 Detroit Leg. N. 431.

**41.** *Lammerman v. Detroit Citi-*

a miscarriage resulting from a shock or an injury negligently caused by the company.<sup>42</sup>

§ 508. **Injury to child.** — The measure of damages to a parent from an injury to his minor child is his expenses for nursing, medical and surgical attendance, the increased expense of maintaining her during minority, and the loss of future services to the age of twenty-one.<sup>43</sup> The damages recoverable for the negligent killing of a child five years old are not restricted to a merely nominal sum, though the only evidence forming a basis for the determination of the amount of damages is as to the age, sex, and general intelligence of the deceased.<sup>44</sup> Loss of prospective earnings during infancy may be recovered in an action by a father as administrator, for the death of his infant child, where the deceased left no widow or children, where the father is the exclusive beneficiary of any recovery had in such action under a statute.<sup>45</sup> And in an action by a parent for personal injuries to her infant son, it was held not to be error for the court to charge

zens' R. Co., 112 Mich. 602, 71 N. W. 153, 4 Detroit Leg. N. 134.

42. *Jones v. Brooklyn H. R. Co.*, 23 App. Div. (N. Y.) 141, 48 N. Y. Supp. 914, where it resulted from shock caused by a blow on the temple by a glass globe negligently permitted to fall on the person injured; *Tunnicliffe v. Bay Cities Consol. R. Co.*, 102 Mich. 624, 61 N. W. 11, 32 L. R. A. 142; *Mitchell v. Rochester R. Co.*, 151 N. Y. 107, 45 N. E. 354, 34 L. R. A. 781, recovery cannot be had when caused by fright alone. See also *Pollock v. Brooklyn & C. R. Co.*, 15 N. Y. Supp. 189; *Wynn v. Central Park St. Ry. Co.*, 14 N. Y. Supp. 172; *Augusta & S. R. Co. v. Randall*, 79 Ga. 304, 4 S. E. 674; *Ry. Co. v. Peckert*, 2 Cent. 791; *Baltimore City Pass. Ry. Co. v. Kemp*, 61 Md. 619; *Fitton v. Brooklyn City R. Co.*, 5 N. Y. Supp.

641; *Looram v. Third Ave. R. Co.*, 57 N. Y. Super. Ct. 165; *O'Neil v. Dry Dock, etc., R. Co.*, 15 N. Y. Supp. 84.

43. *San Antonio St. R. Co. v. Muth*, 7 Tex. Civ. App. 443, 27 S. W. 752.

44. *Howell v. Rochester R. Co.*, 24 App. Div. (N. Y.) 502, 49 N. Y. Supp. 17.

**Funeral expenses** being part of pecuniary damages from the death of a child, when they have been paid by the father, can be recovered in an action by him as administrator. *Consol. Traction Co. v. Hone*, 59 N. J. L. (30 Vroom) 275, 35 Atl. 899; *revd.* 60 N. J. L. 444, 38 Atl. 759.

45. *Coghlan v. Third Ave. R. Co.*, 16 Misc. Rep. (N. Y.) 677, 25 Civ. Pro. (N. Y.) 249, 39 N. Y. Supp. 113; *affd.*, 39 N. Y. Supp. 1098. See also *Hurst v. Detroit City Ry. Co.*, 84

that the jury were permitted to use their judgment, common sense and sound discretion, under limitations of the evidence, in arriving at the value of future services of the minor to his mother during the period of his minority.<sup>46</sup> And an instruction that a parent is entitled to compensation for loss of the services of his minor son and for the services of himself and family in nursing the child, is proper, although there is no evidence as to the value of such services.<sup>47</sup> But the father of an infant child cannot recover as damages for its injury for mere inconvenience to other members of the family resulting from such injury which does not affect him pecuniarily.<sup>48</sup>

§ 509. Elements and measure of damages in other actions. — The sum expended by the owner of a delivery wagon for the hiring of another wagon, while his own is being repaired, is a proper element of damages for injury done to his wagon by colliding with a street car.<sup>49</sup> Price paid for a new horse after injury of another cannot be considered an item of damages because of such injury, especially when the injured one fully recovers.<sup>50</sup> The measure of damages for the breach of a contract of employment by the employer is *prima facie* the sum stipulated to be paid for the services, and the burden of reducing the damages by proof of other earnings by the employee rests on the employer.<sup>51</sup> The measure of damages in favor of one whose horse and wagon were

Mich. 539, 48 N. W. 44; Covington St. Ry. Co. v. Packer, 9 Bush (Ky.) 455.

46. El Paso Electric Ry. Co. v. Kitt, (Tex. Civ. App.) 4 St. Ry. Rep. 1042, 90 S. W. 678.

47. Drogmund v. Metropolitan St. Ry. Co., 122 Mo. App. 154, 6 St. Ry. Rep. 21, 98 S. W. 1091.

48. Woeckner v. Erie Elec. Motor Co., 182 Pa. St. 182, 37 Atl. 936. A minor suing for personal injuries may recover for pain of body and mind, loss of earnings after the legal period of infancy, for physical dis-

figurement or deformity, and for any other permanent physical effects produced by the injury. Rosencranz v. Lindell Ry. Co., 108 Mo. 9, 18 S. W. 890.

49. Rogers v. Interurban St. Ry. Co., 84 N. Y. Supp. 974.

50. Cady v. Third Ave. R. Co., 29 Misc. Rep. (N. Y.) 741, 60 N. Y. Supp. 269. See Brown v. Wilmington City Ry. Co., 1 Penn. (Del.) 322, 40 Atl. 936, 12 Am. & Eng. R. Cas. N. S. 439.

51. Mathesius v. Brooklyn H. R. Co., (U. S. C. C., N. Y.) 96 Fed. 793.

run into by a trolley car is such sum as will reasonably compensate him for the actual injuries to his horse, harness, and wagon, which may include the loss of their use and the expense of doctoring the horse.<sup>52</sup> The measure of damages in a case for the negligent killing of an animal is the value of the animal at the time of its killing, with interest thereon at the legal rate from such time.<sup>53</sup> The measure of damages for an injury to a violin is the cost of its repair, compensation for the loss of it during repair, and the difference in its value before and after the injury.<sup>54</sup> In an action for damages for injuries to a wagon by collision with a grip car, the recovery may be for the difference in value of the property before and after the injury, and also for loss of use thereof.<sup>55</sup>

**§ 510. Exemplary or punitive damages.**—For injuries caused by mere failure to use ordinary care only compensatory damages can be allowed.<sup>56</sup> Punitive or exemplary damages are in the nature of a penalty especially designed as a punishment for the wanton conduct or malicious motives of a tortfeasor. A corporation, like a natural person, may be held liable in exemplary or punitive damages for the act of an agent within the scope of his employment, provided the criminal or reprehensible act necessary to warrant the imposition of such damages is brought home to the corporation.<sup>57</sup> Exemplary or punitive damages against a

**52.** *Brown v. Wilmington City Ry. Co.*, 1 Penn. (Del.) 332, 40 Atl. 936, 12 Am. & Eng. R. Cas. N. S. 439.

**53.** *San Antonio St. R. Co. v. Wray*, (Tev. Civ. App.) 37 S. W. 641.

**54.** *Schalscha v. Third Ave. R. Co.*, 19 Misc. Rep. (N. Y.) 141, 43 N. Y. Supp. 251.

**55.** *Hoffman v. Met. St. R. Co.*, 51 Mo. App. 273.

**56.** *Citizens' St. Ry. Co. v. Steen*, 42 Ark. 321.

**57.** *Forhman v. Consol. Trac. Co.*, 63 N. J. L. 391, 43 Atl. 892, 6 Am. Neg. Rep. 601, the railroad company

is not liable for punitive or exemplary damages, unless the company participated in the wrongful act, either expressly or impliedly, by its conduct authorizing or approving it, either before or after it was committed; *Lake Shore & M. S. R. Co. v. Prentice*, 147 U. S. 101, 37 L. ed. 97, 7 Am. R. & Corp. Rep. 106, 13 S. Ct. 261; *Robinson v. Sup. R. T. R. Co.*, 94 Wis. 345, 68 N. W. 961, 34 L. R. A. 205; *Phila. Traction Co. v. Orbann*, 119 Pa. St. 37; 12 Atl. 816, where there is no evidence that the wrongful act was the result of feel-

street railroad company cannot be recovered in the absence of proof of malice, or that the wrongful act was wilfully done in a wanton or oppressive manner, or done with reckless disregard of the rights of the complaining party. This must be evidenced by the character of the act itself, and proof that the wrongful act was done pursuant to prior authorization, or that it was subsequently ratified, expressly, or impliedly by the retention in service of the employee whose wrongdoing caused the injury.<sup>58</sup> The correct rule is said to be that where the defendant's act, which is the subject-matter of the action, is shown to have been wanton, or malicious, or fraudulent, or oppressive, and of such a character as to indicate that he acted with a reckless disregard of the rights of the plaintiff, the jury in their discretion may award to the plaintiff, in addition to his compensatory damages, such further reasonable sum as exemplary damages as they deem just; but the plaintiff is not entitled to such damages, as a matter of legal right, in any case.<sup>59</sup> It has also been held that to justify an award of exemplary damages against a carrier for injuries to a passenger there must have been malice or fraud, or at least gross

ings of violence, outrage, or reckless indifference, the question of exemplary damages should not be submitted to the jury. *Denver Tramway Co. v. Cloud*, 6 Colo. App. 445, 40 Pac. 779.

**58.** *Kirton v. North Chicago St. R. Co.*, 91 Ill. App. 554, if an act complained of was wilful, wanton, or malicious, the jury is authorized to give smart money or punitive damages; *Lexington Ry. Co. v. Cozine*, 23 Ky. L. Rep. 1137, 64 S. W. 848, it is proper to award punitive damages for a malicious assault by a conductor, in the course of his employment, upon a passenger. Where plaintiff, while a passenger on defendant's street car, was insulted by the motorman, the fact that defendant was innocent of, and did not author-

ize or ratify, the acts of the motorman, will not relieve it from liability for punitive damages, *Knoxville Trac. Co. v. Lane*, 103 Tenn. 376, 53 S. W. 557. See *Texas & Pac. Ry. v. Gott*, 20 Tex. Civ. App. 335, 50 S. W. 193; *Masterson v. Ry. Co.*, 102 Wis. 571, 78 N. W. 757; *Ford v. Charles Warner Co.*, 1 Marv. (Del.) 88, 37 Atl. 39; *Donivan v. Manhattan R. Co.*, 1 Misc. Rep. (N. Y.) 368, 49 St. Rep. (N. Y.) 722, 21 N. Y. Supp. 457, 47 Alb. L. J. 50, the mere retention of a servant after his wilful tort, without proof of knowledge on the part of the master, will not constitute a ratification of the tort so as to render the master liable for punitive damages.

**59.** *Berg v. St. Paul City Ry. Co.*, 96 Minn. 513, 4 St. Ry. Rep. 522, 105 N. W. 191.

negligence on the part of the carrier.<sup>60</sup> Where, in an action against a street railroad company by a passenger to recover for an assault by one of its employees, it did not appear that defendant had employed an improper servant, or ever authorized him directly or indirectly to assault plaintiff, or participated in the act, or ratified or approved it, it was error to allow the jury to award punitive damages, and required a reversal of the judgment, where the award much exceeded the actual damages incurred.<sup>61</sup> Punitive damages may be recovered of a carrier by a passenger, where through wilfulness or gross negligence of the conductor the passenger was carried by the place at which, when paying her fare, she told the conductor she wanted to get off.<sup>62</sup> Punitive damages or counsel fees are not allowed in actions based upon the plaintiff's being required to pay additional fare or being ejected from the car for refusing by reason of a conductor's mistake or negligence in making out a transfer, when fraud, malice, or insult do not appear.<sup>63</sup> In such cases only compensatory damages for loss of time, fare paid in excess, and for the indignity, humiliation, and injury to his feelings can be recovered.<sup>64</sup> Puni-

**60.** *Wigton v. Met. St. Ry. Co.*, 38 App. Div. (N. Y.) 207, 56 N. Y. Supp. 647.

**61.** *Rowe v. Brooklyn H. R. Co.*, 71 App. Div. (N. Y.) 474, 75 N. Y. Supp. 893; *Memphis St. Ry. Co. v. Shaw*, 1 St. Ry. Rep. 771, 110 Tenn. 467, 75 S. W. 713, where the conductor had only two passengers to look after, and was asked by plaintiff, in ample time, to stop the car at a certain point, but carried her to the end of the line, and on the return demanded an additional fare, became angry and quarreled with her, threatened and ridiculed her, carried her again beyond her stopping place, and started his car when she attempted to alight before she was safely on the ground.

**62.** *Birmingham Ry., L. & P. Co.*

*v. Nolan*, 134 Ala. 329, 32 So. 715; *Packet Co. v. Nagel*, 97 Ky. 9, 29 S. W. 743; *Samuels v. R. Co.*, 35 S. C. 493, 14 S. E. 943.

**63.** *Little Rock Traction & Elec. Co. v. Winn*, 75 Ark. 529, 4 St. Ry. Rep. 42, 87 S. W. 1025; *Peterson v. Middlesex & Somerset Trac. Co.*, 71 N. J. L. 296, 3 St. Ry. Rep. 622, 59 Atl. 456; *Carr v. Toledo Trac. Co.*, 10 Ohio Dec. 296; *Hamilton v. Third Ave. R. Co.*, 53 N. Y. 25; *Pine v. St. Paul City R. Co.*, 50 Minn. 144, 52 N. W. 392. But see *City & Suburban Ry. Co. v. Brauss*, 70 Ga. 368; *City & Suburban Ry. Co. v. Findley*, 76 Ga. 313; *Muckle v. Rochester Ry. Co.*, 79 Hun (N. Y.) 32, 61 St. Rep. (N. Y.) 193, 29 N. Y. Supp. 732.

**64.** *Jacobs v. Third Ave. R. Co.*, 75 N. Y. Supp. 679.

tive damages may be recovered from an employer for injuries inflicted wantonly or intentionally by his employee acting within the general scope of his employment.<sup>65</sup> Corporations are liable for punitive damages for libel published by their agents while acting within the scope of their authority, malice being implied from the publication.<sup>66</sup> The arrest of a passenger without probable cause, by a conductor, does not make the company liable for punitive damages in addition to compensatory damages, where the conductor acted under an honest mistake, without actual malice or a design to injure or oppress.<sup>67</sup> But exemplary damages may be recovered for an arrest wanton, oppressive, or in open disregard of the right of the person arrested to personal liberty, although there was no actual malice.<sup>68</sup> And where the conductor kicked a boy in the region of the heart as he was about to board the car as a passenger exemplary damages were held proper.<sup>69</sup> And it has been decided that punitive damages may be recovered where the ejection of a passenger was without justification, excuse or explanation or accompanied by excessive force.<sup>70</sup>

**65.** *Highland Ave. & B. R. Co. v. Robinson*, 125 Ala. 483, 28 So. 28; *Dinsmoor v. Wolber*, 85 Ill. App. 152; *Louisville & N. R. Co. v. Kelly's Adm'x*, 100 Ky. 421, 38 S. W. 852, 40 S. W. 452.

**66.** *Lake Shore & M. S. R. Co. v. Prentice*, 147 U. S. 101, 37 L. ed. 97, 7 Am. R. & Corp. Rep. 106, 13 S. Ct. 261; *Phila., W. & B. R. Co. v. Quigley*, 21 How. 22, 16 L. ed. 73; *Denver & R. G. R. Co. v. Harris*, 122 U. S. 597, 30 L. ed. 1146.

In New Jersey it has been decided that the liability to respond in punitive damages is limited to the actual wrong done and that a street railroad company is not liable in such damages to a passenger who was ejected wrongfully and with unnecessary violence where it did not participate in the wrongful acts, either by author-

izing or approving of them either before or after they were committed. *Peterson v. Middlesex & Somerset Traction Co.*, 71 N. J. L. 296, 3 St. Ry. Rep. 622, 59 Atl. 456.

**67.** *Claiborne v. Chesapeake & O. R. Co.*, 46 W. Va. 363, 33 S. E. 262, 14 Am. & Eng. R. Cas. N. S. 217; *Edgerly v. Union St. R. Co.*, 67 N. H. 312, 36 Atl. 588; *Pittsburgh & C. R. Co. v. Pillow*, 76 Pa. St. 510, 18 Am. Rep. 424; *Flint v. Norwich & N. Y. Turnp. Co.*, 34 Conn. 554.

**68.** *Kolzem v. Broadway & S. A. R. Co.*, 1 Misc. Rep. (N. Y.) 148, 48 St. Rep. (N. Y.) 656, 20 N. Y. Supp. 700.

**69.** *Sommerfield v. St. Louis Transit Co.*, 182 Mo. 676, 3 St. Ry. Rep. 514, 81 S. W. 880.

**70.** *Sommerfield v. St. Louis Transit Co.*, 108 Mo. App. 718, 3 St. Ry.

The allowance of punitive damages is a matter in the discretion of the jury and, in an action for the ejection of a passenger from a street car, it is error to instruct the jury that they should award plaintiff punitive damages if they find such ejection to have been wilful and without legal excuse or justification or provocation.<sup>71</sup>

§ 511. **Damages not excessive.** — The courts in the exercise of their power to review the verdicts of juries if the amounts found are so disproportionately large or small as to show that the jury must necessarily have been influenced by improper motives or must have proceeded upon a wrong principle, have held damages in the following amounts not to be excessive under the circumstances attending the cases wherein they were adjudged:

\$2,500. In an action by a passenger for an assault made by the conductor of the defendant, where there is evidence that the plaintiff was badly beaten and disabled.<sup>72</sup>

\$1,000. Where conductor kicked boy in region of heart as he was about to board car to become a passenger; \$250 for compensatory damages and \$750 for punitive damages sustained.<sup>73</sup>

\$267. Malicious assault and battery in attempted ejection of passenger from car; \$17 actual and \$250 punitive damages.<sup>74</sup>

\$1,400. Passenger at time of injury thirty-four years of age, strong, healthy and robust, weighing 175 pounds, made, as result of injury, a nervous wreck, and suffered from insomnia, pleurisy, neuralgia, and irregular menstruation.<sup>75</sup>

\$2,500. Where an injured party was two months in the hospital, walked on crutches for four years, and her recovery is a matter of doubt.<sup>76</sup>

Rep. 566, 84 S. W. 172; Lexington Ry. Co. v. O'Brien, 27 Ky. L. Rep. 336, 3 St. Ry. Rep. 270, 84 S. W. 1170.

71. Carmody v. St. Louis Transit Co., 122 Mo. App. 338, 5 St. Ry. Rep. 536, 99 S. W. 495.

72. Birmingham Ry. & El. Co. v. Baird, 130 Ala. 334, 30 So. 456, 54 L. R. A. 752.

73. McNamara v. St. Louis Transit Co., 182 Mo. 676, 3 St. Ry. Rep. 514, 81 S. W. 880.

74. Madigan v. St. Louis Transit Co., 117 Mo. App. 118, 5 St. Ry. Rep. 629, 93 S. W. 316.

75. Galveston, H. & S. A. Ry. Co. v. Vallrath, 40 Tex. Civ. App. 46, 4 St. Ry. Rep. 1022, 89 S. W. 279.

76. Chicago City Ry. Co. v.

\$1,000. Where a passenger, injured on a street car by slipping on ice and snow negligently allowed to accumulate on the steps, receives internal injuries which may be permanent, and a severe nervous shock, greatly impairing her health.<sup>77</sup>

\$1,000. Where a passenger, while transferring at night, received severe injuries to the knee joint by stepping into a trolley pole hole, and the upper and front portions of the ligaments of the knee were torn loose, and the muscles were seriously sprained, and in consequence thereof the person injured was confined in bed for a week, and suffered great pain for two weeks, and some pain thereafter, and he continued on crutches for sixty days, and was unable to work for eighty-three days, and to some extent his injuries were permanent, and he also paid twenty-five dollars for surgeon's services.<sup>78</sup>

\$2,000. In favor of a man seventy years of age, since he is entitled to the fair use of his limbs without pain the remainder of his life, and may recover for the aggravation of natural infirmities.<sup>79</sup>

\$4,500. Where plaintiff was forty-five years old, and had four ribs fractured and pushed in so as to cause permanent injury, affecting respiration and producing constant pain, and destroying his earning capacity, which had formerly been ten dollars a week.<sup>80</sup>

\$3,500. Where plaintiff's left leg had become an inch shorter than the right, and the cartilage of the hip joint was wasting away, and plaintiff had become a victim to a permanent, progressive disease, which would cripple him more and more as it progressed.<sup>81</sup>

\$200. Where the evidence showed that the plaintiff was considerably bruised; that he suffered pain for a long time; that it hurt him to sleep on one side; that his arm had been crooked since

Cooney, 95 Ill. App. 471; *affd.*, 196 Ill. 466, 63 N. E. 1029.

**77.** *Herbert v. St. Paul City Ry. Co.*, 85 Minn. 341, 88 N. W. 996.

**78.** *Colorado & Cripple Creek Ry. Co. v. Petitt*, 37 Colo. 326, 5 St. Ry. Rep. 58, 86 Pac. 121.

**79.** *Fleming v. Kansas City & B. R. Co.*, 89 Mo. App. 129.

**80.** *Perry v. Met. St. Ry. Co.*, 68 App. Div. (N. Y.) 351, 74 N. Y. Supp. 1.

**81.** *Napier v. Brooklyn H. R. Co.*, 68 App. Div. (N. Y.) 200, 74 N. Y. Supp. 7.

the accident, and that after he had worked for some time he would have a pain in the chest.<sup>82</sup>

\$4,346.93 Where plaintiff, a young man, appears to have sustained a permanent crippling of a limb, in addition to temporary suffering.<sup>83</sup>

\$1,500. Where a self-supporting washerwoman, sixty-three years old, a widow, in vigorous health, and earning for the support of herself and an unmarried sick and dependent daughter from \$8 to \$11 a week, as the result of her injuries had become bent and decrepit, in constant pain, and an apparent charge for life upon her married daughter.<sup>84</sup>

\$4,500. Personal injuries incapacitating a passenger, a strong, healthy woman, from taking care of a numerous household. The injuries sustained rendered her weak and incapable of labor and made her a nervous wreck. Also in addition to other injuries her nose was broken and her sight impaired.<sup>85</sup>

\$2,000. Where a passenger was seventy-five years old, and up to the time of the injury had been active and in good health, and engaged in his own business, which was extensive, had held positions of trust in several financial institutions, and as a result of the injury he became afflicted with heart disease, by which his capacity to transact his business was seriously impaired.<sup>86</sup>

\$3,000. In an action by a married woman, twenty-nine years old, for injuries which had caused her to suffer much pain for nearly two years and one-half prior to the trial.<sup>87</sup>

\$8,400. Where a man forty years of age, injured by a street railway car, loses a foot, the hearing of one ear, the sense of smell, and suffers intense pain for months, besides losing his business.<sup>88</sup>

**82.** Cincinnati L. & A. Elec. St. Ry. Co. v. Leonard, 35 Ind. App. 268, 3 St. Ry. Rep. 233, 73 N. E. 932.

**83.** Bertsch v. Met. St. Ry. Co., 68 App. Div. (N. Y.) 228, 74 N. Y. Supp. 238.

**84.** Sidmonds v. Brooklyn H. R. Co., 69 App. Div. (N. Y.) 471, 74 N. Y. Supp. 989.

**85.** Latimer v. Metropolitan St.

Ry. Co., 126 Mo. App. 70, 5 St. Ry. Rep. 642, 103 S. W. 1102.

**86.** Storrs v. Los Angeles Traction Co., 134 Cal. 91, 66 Pac. 72.

**87.** Wolf v. Third Ave. R. Co., 67 App. Div. (N. Y.) 605, 74 N. Y. Supp. 336.

**88.** Central Ry. Co. v. Bannister, 96 Ill. App. 332; affd., 62 N. E. 864, 195 Ill. 48.

\$1,900. Where there was evidence that certain tumors were caused by the injury and it was necessary to perform a surgical operation, and a physician testified that there was a defective condition at the place where the tumors were removed, which would be permanent.<sup>89</sup>

\$7,500. Where a man about forty years of age was healthy, strong, active, and capable of hard manual labor, and had been thirteen years employed by a single firm as a teamster, and earned twelve dollars a week; after the injury he had pains in his stomach, breast, back, and in his legs, so that he could use them but very little, and there were other complications.<sup>90</sup>

\$4,500. Where plaintiff, a woman about thirty-one years of age, in good health, and capable of earning her own living, sustained a fracture of three ribs on one side, and a contusion on her shoulder and head, from which she suffered continually to the time of the trial, some seventeen months after, and was short of breath and unable to work, and there was a general deterioration in her health, which her physicians testified might result from her injuries.<sup>91</sup>

\$10,000. Where a young and healthy man, earning \$3,000 annually, sustains injuries by the negligent derailment of a street car from which he may never fully recover, and which causes him great pain and suffering.<sup>92</sup>

\$3,000. Where an employee of a street railway company, employed to fire and wipe its engines in its power house, was injured by a fall through a defective floor, rupturing the ligaments of his back and breaking one of his ribs, and his head was injured so that he became entirely deaf in one ear.<sup>93</sup>

\$3,000. Where a person in entering a car struck her toe against an obstacle in the floor, stumbled forward, and the lower part of

**89.** *Jarvis v. Met. St. Ry. Co.*, 63 App. Div. (N. Y.) 311, 71 N. Y. 65 App. Div. (N. Y.) 490, 72 N. Y. Supp. 829.

**90.** *Chicago City Ry. Co. v. Anderson*, 93 Ill. App. 419; *affd.*, 193 Ill. 9, 61 N. E. 999.

**91.** *Ivey v. Brooklyn H. R. Co.*,

63 App. Div. (N. Y.) 311, 71 N. Y. Supp. 633.

**92.** *Macon v. Consolidated Street R. Co. v. Barnes*, 113 Ga. 212, 38 S. E. 756.

**93.** *Chicago Gen. Ry. Co. v. McNamara*, 94 Ill. App. 188.

her body passed through an opening in the floor and down amongst the machinery of the car, sustaining serious permanent injuries.<sup>94</sup>

\$5,000. Where a driver of a wagon, who was fifty-six years of age and only qualified for work of that character, was severely injured, and his injuries rendered walking painful, and were such as were liable to cause him considerable suffering and to incapacitate him from much physical exertion for the rest of his life.<sup>95</sup>

\$3,500. Where a man fifty years of age received permanent injuries, which grew progressively worse, and required the expenditure of \$600 for physician's services.<sup>96</sup>

\$3,000. Where plaintiff before the accident had an earning capacity of \$12 per week, and had been incapacitated from work for fourteen months, and one of his legs was an inch shorter than before, and he experienced considerable pain in it, and it was shown that, owing to the shortening of his leg, he could not do all the kinds of work that he could before.<sup>97</sup>

\$15,000. For causing the death of a coachman thirty-six years old, healthy and vigorous, and leaving a wife and seven children.<sup>98</sup>

\$5,000. Where a passenger, fifty-eight years old, a hard working man of good habits and in good health, earning \$10.50 a week, was killed, and left a widow, a minor son, and five grown children.<sup>99</sup>

\$1,054. Where plaintiff, a farmer, struck by a crossbar on defendant's car, became senseless and ill, and suffered great pain and dizziness, attended with nausea and vomiting, suffered great pain in the head throughout the summer, and was unable to work or to go into his fields to superintend his men without a sunshade,

<sup>94</sup>. *Jordan v. St. Louis & M. R. R. Co.*, 122 Mo. App. 330, 5 St. Ry. Rep. 630, 99 S. W. 492.

<sup>95</sup>. *Hires v. Atlantic City R. Co.*, 66 N. J. L. 30, 48 Atl. 1002.

<sup>96</sup>. *Mowbray v. Brooklyn H. R. Co.*, 59 App. Div. (N. Y.) 239, 69 N. Y. Supp. 435.

<sup>97</sup>. *Weingarten v. Met. St. Ry.*

*Co.*, 62 App. Div. (N. Y.) 364, 70 N. Y. Supp. 1113.

<sup>98</sup>. *Reilly v. Brooklyn H. R. Co.*, 65 App. Div. (N. Y.) 453, 72 N. Y. Supp. 1080.

<sup>99</sup>. *Indianapolis Traction & Terminal Co. v. Romans*, 40 Ind. App. 184, 5 St. Ry. Rep. 219, 79 N. E. 1068.

and suffered like pain in a lesser degree during a following summer.<sup>1</sup>

\$400. Where plaintiff, a man seventy years old, was thrown down by the sudden starting of a street car, and sustained painful injuries, and there was no evidence of his earning capacity except that he had been able to support himself.<sup>2</sup>

\$16,927. Passenger weighing two hundred pounds, fifty years of age, and in perfect physical and mental health, thrown from car suddenly rounding curve, as a result of which he became a physical wreck, and his mind very badly affected.<sup>3</sup>

\$5,500. Passenger thrown from seat in rounding curve. Plaintiff's physician testified that she was confined to her bed for three weeks; that his bill was \$225; that her neurasthenic condition would be permanent, and that she could stand on her feet only a short time, and only walk a little. Another physician was of the opinion that she would recover after some time, and a third physician was of the opinion that she would recover in a month.<sup>4</sup>

\$1,000. Where boy seven years old riding with his mother on summer car was thrown from seat in car to the ground and run over and killed.<sup>5</sup>

\$1,400. The testimony showing that plaintiff was rendered unconscious by the accident, and remained so for three days; that her knee and elbow were bruised and bleeding; that the left side of her head was swollen; her ear was bleeding; that she was in bed three weeks and at home for seven weeks; had suffered pain in her head and hip, and at the time of the trial had pains in her ear; that her head buzzed, and she had headaches; and that her weight was reduced twenty pounds.<sup>6</sup>

1. *Smith v. Nassau Elec. R. Co.*, 57 App. Div. (N. Y.) 152, 67 N. Y. Supp. 1044.

2. *French v. Brooklyn H. R. Co.*, 57 App. Div. (N. Y.) 204, 68 N. Y. Supp. 287.

3. *Dupuis v. Saginaw Valley Traction Co.*, 146 Mich. 151, 5 St. Ry. Rep. 512, 109 N. W. 413.

4. *Chadwick v. St. Louis Transit Co.*, 195 Mo. 517, 4 St. Ry. Rep. 662, 93 S. W. 798.

5. *Indianapolis Traction & Term. Co. v. Reckman*, 40 Ind. App. 100, 5 St. Ry. Rep. 278, 81 N. E. 82.

6. *Radjaviller v. Third Ave. R. Co.*, 58 App. Div. (N. Y.) 11, 68 N. Y. Supp. 617.

\$1,200. Where plaintiff was rendered unconscious for some time, suffered a severe cut on his head, his nose was smashed, and he was bruised and his skin broken in many places.<sup>7</sup>

\$1,000. For an injury resulting in a broken arm, which prevented plaintiff from working for three months, and gave her more or less trouble thereafter.<sup>8</sup>

\$7,500. Where plaintiff, a woman thirty-six years of age, in previous good health, as a result of injury, was permanently deformed; the left foot being turned in toward the right, the heel raised from the floor about two inches, and the knee and thigh flexed and bent; the hip bone was also drawn about two inches, and the spine and lower shoulder permanently crippled.<sup>9</sup>

\$5,000. Where a healthy young woman, nineteen years of age, after the injury was subject to constant pain in the back, her knee troubled her, and her nervous condition was bad and growing worse, and a physician testified that he found, on an examination made at the time of the trial, that there was a displacement of the womb and of the left ovary, that a result of this condition would be neurasthenia or general nervous weakness; and that in his opinion her condition would be permanent, though it might be helped by an operation, which would involve much danger.<sup>10</sup>

\$3,500. Damages for the fracture of the acromion process and of the humerus of a seven-year-old child, where the child suffered, and was likely to continue to suffer, from his injuries.<sup>11</sup>

\$15,941.25. Where the evidence showed that plaintiff was a boy eighteen months old, and that his leg was amputated above the knee.<sup>12</sup>

7. *Chattanooga Rapid Transit Co. v. Walton*, 105 Tenn. 415, 58 S. W. 737.

8. *Wahlgren v. Market St. Ry. Co.*, 132 Cal. 656, 62 Pac. 308, 64 Pac. 993.

9. *West Chicago St. Ry. Co. v. Tuerk*, 99 Ill. App. 105.

10. *Chicago & A. R. Co. v. McDonnell*, 91 Ill. App. 488.

11. *Hutchinson v. Atlantic Ave. R. Co.*, 161 N. Y. 635, 57 N. E. 1112; affg. 33 App. Div. (N. Y.) 569, 53 N. Y. Supp. 1076.

12. *Kalfur v. Broadway, F. & M. A. R. Co.*, 161 N. Y. 660, 57 N. E. 1113.

\$2,000. Where passenger, a minor, had previously been in perfect health and finely physically developed, was about six feet tall, erect and well proportioned, weighing about two hundred pounds, and since receiving his injuries had lost his fine physical form, had become hump shouldered, had lost his erect and physical symmetry, and whereas he had been previously able to work on the farm, was unable to do any work after his injuries.<sup>13</sup>

\$5,000. Where plaintiff suffered a fracture of the knee-cap and of one of the bones of the heel, and received a blow which produced a tumor, from which a disease of the kidneys had developed, which was reasonably certain to be permanent.<sup>14</sup>

\$12,750. Where plaintiff, aged thirty-one, living with her husband, a policeman, and doing all the housework, suffered a sprained back, a very bad sprain of the right ankle and a laceration of its ligaments, and three fractures and a laceration of the left ankle, and much attendant pain and suffering, a weakness in the right foot, deformity in the left foot, and it was impossible for her to get her heel on the ground, and the foot would not support the normal weight of the body; there was a permanent inflammation; plaintiff required support to stand, and a crutch in walking; and suffered continuous pain and her crippled condition was permanent.<sup>15</sup>

\$7,250. For loss of services of plaintiff's wife who was forty-eight years old, where she was practically incapacitated for discharging nearly all of her wifely duties.<sup>16</sup>

\$1,500. For ejection of a passenger from a street car.<sup>17</sup>

\$1,600. Passenger, a young man twenty-five years of age,

**13.** *Citizens' Ry. Co. v. Wade*, 40 Tex. Civ. App. 561, 4 St. Ry. Rep. 1047, 91 S. W. 645.

**14.** *Koehne v. N. Y. & Q. C. R. Co.*, 165 N. Y. 603, 58 N. E. 1089; affg. 52 N. Y. Supp. 1088.

**15.** *Leonard v. Brooklyn H. R. Co.*, 57 App. Div. (N. Y.) 125, 67 N. Y. Supp. 985.

**16.** *Zingrebe v. Union Ry. Co.*, 56

App. Div. (N. Y.) 555, 67 N. Y. Supp. 554.

**17.** *Foley v. Met. St. Ry. Co.*, 80 App. Div. (N. Y.) 262, 80 N. Y. Supp. 246, the court considered the element of humiliation, the conductor insisting the plaintiff had not paid his fare, having repeatedly struck and kicked him, and endeavored to assault him with a piece of iron, which he

ejected from car and falling. As a result of his injuries a traumatic ulcer broke out upon his leg, causing him to remain in bed for a considerable time and necessitating an operation and treatment for ten weeks in a hospital and incapacitating him for labor of any kind up to the time of the trial, a year and six months.<sup>18</sup>

\$750. For ejection of passenger, for rude and insulting language of the conductor, and for causing such passenger's arrest for alleged disorderly conduct, a verdict for \$500 compensatory damages and \$250 punitive damages.<sup>19</sup>

\$1,000. Where a boy of the age of six years is injured, the shock and pain being very severe.<sup>20</sup>

\$3,000. Where plaintiff suffered a fracture of the neck of the femur by the premature starting of the car.<sup>21</sup>

\$1,500. Where the use of plaintiff's arm was impaired.<sup>22</sup>

\$7,750. Where a strong, healthy man, forty-seven years of age, a ship carpenter by trade, capable of earning from \$3.50 to \$7 a day, loses one of his hands in consequence of the injury, rendering him unable to work at his trade.<sup>23</sup>

\$10,885.62. Where plaintiff was forty-five years of age, and a mason, who had earned from \$3 to \$5 per day; one of his hands was practically ruined for the purposes of his trade; he had suffered much pain, and had paid, or was liable to pay, considerable in doctor's bills.<sup>24</sup>

\$10,000. Where plaintiff had sustained a fracture of two ribs, contusion on the chest, bruises on the back, head and hand, and had developed pleurisy from the rib fracture, and a nervous

was prevented by plaintiff's companion from doing, and it not appearing plaintiff's resistance was such as in any way to mitigate or palliate the unprovoked violence.

18. *Hirte v. Eastern Wisconsin Ry. & L. Co.*, 127 Wis. 230, 4 St. Ry. Rep. 1072, 106 N. W. 1068.

19. *Little Rock Ry. & Elec. Co. v. Dobbins*, 78 Ark. 553, 5 St. Ry. Rep. 22, 95 S. W. 788.

20. *Chicago City Ry. Co. v. Biederman*, 102 Ill. App. 617.

21. *Beringer v. Dubuque St. Ry. Co.*, 118 Iowa 135, 91 N. W. 931.

22. *Wagner v. Met. St. Ry. Co.*, 79 App. Div. (N. Y.) 591, 80 N. Y. Supp. 191.

23. *South Chicago City Ry. Co. v. Dufresne*, 102 Ill. App. 493; *affd.*, 65 N. E. 1075, 200 Ill. 456.

24. *Sesselman v. Met. St. Ry. Co.*,

tremor indicating chronic sclerosis of the spinal cord and brain, which was progressive and incurable.<sup>25</sup>

\$10,000. Where plaintiff, who was a licensed pilot and a member of the Sandy Hook Pilots' Association, suffered a fracture of his thigh with permanent displacement, and was reduced in income from \$200 a month to \$75 a month pension.<sup>26</sup>

\$2,000. Where plaintiff, a skilled tinsmith, forty-five years of age, was confined by his injuries seven weeks and unable fully to perform the labors of his trade thereafter, and his injuries consisted of bruises, dislocation of his shoulder, and fracture in the shoulder joint by which his arm was permanently disabled.<sup>27</sup>

\$2,750. For negligently causing the death of a boy six years of age.<sup>28</sup>

\$4,250. Where a young woman is confined to her bed for six or seven months, and her injuries result in impairment of her health and subject her to continuous suffering from nervous prostration.<sup>29</sup>

\$2,500. As compensation for a broken leg and much consequent suffering.<sup>30</sup>

\$10,000. Where a lady, twenty-five years of age, of excellent health, a graduate of music, and well qualified to teach vocal and instrumental music, received injuries from which there is little hope of her recovery.<sup>31</sup>

\$2,500. Where a woman passenger was made permanently lame, her left arm disabled so that she could not use it three years afterward as she formerly did, and abscess had formed on her

76 App. Div. (N. Y.) 336, 78 N. Y. Supp. 482.

25. *Clark v. Brooklyn H. R. Co.*, 78 App. Div. (N. Y.) 478, 79 N. Y. Supp. 811, 12 N. Y. Ann. Cas. 333.

26. *Waldie v. Brooklyn H. R. Co.*, 78 App. Div. (N. Y.) 557, 79 N. Y. Supp. 922.

27. *Meyer v. Milwaukee El. Ry. & L. Co.*, (Wis.) 93 N. W. 6.

28. *Gray v. St. Paul City Ry. Co.*,

87 Minn. 280, 91 N. W. 1106.

29. *West Chicago St. R. Co. v. Lieserowitz*, 99 Ill. App. 951; *affd.*, 197 Ill. 607, 64 N. E. 718.

30. *Newport News & O. P. Ry. & El. Co. v. Bradford*, 100 Va. 231, 4 Va. Sup. Ct. Rep. 219, 40 S. E. 900.

31. *Springfield Consol. Ry. Co. v. Puntenney*, 101 Ill. App. 95; *affd.*, 200 Ill. 9, 65 N. E. 442.

ankle and she suffered great pain and was under medical treatment.<sup>32</sup>

\$3,401.20. Where the injuries sustained by a small child necessitated the amputation of one limb and two toes from the other.<sup>33</sup>

\$18,000. Where injuries to a young woman consisted of a broken arm, which was so lacerated that it could not be set straight, and was made incapable of perfect movement, and of a fracture of the skull, which often became inflamed, causing nervousness, headaches, loss of memory and weak eyes, which injuries were permanent.<sup>34</sup>

\$2,950. For an injury which suddenly prevents a man in the prime of life from following the trade to which he is accustomed, and at which he was receiving \$1.75 a day.<sup>35</sup>

\$1,500. Where the injuries inflicted consist of a running sore, a severe contusion of the flesh and bone of the leg, producing lameness likely to be permanent, cause pain in the chest and in the leg, the coughing and spitting of blood, and impair the injured man's capacity for the work by which he gains his daily bread.<sup>36</sup>

\$5,000. Where a boy fourteen years old sustained a compound fracture of the leg, resulting in loss of part of the bone, and consequent shortening and otherwise crippling of the leg, was confined in hospital thirteen weeks, for some time thereafter was compelled to use crutches, and for a period of two years continued to suffer great pain, the leg being still weak.<sup>37</sup>

\$4,000. For the loss of an arm of a boy fourteen years of age, poor, black, illegitimate and ignorant, earning but a small sum by helping around a barber shop and blackening shoes.<sup>38</sup>

\$2,500. Where plaintiff was able to earn \$11 a week before

**32.** *Lake St. Elev. R. Co. v. Burgess*, 99 Ill. App. 499.

**33.** *Fullerton v. Met. St. Ry. Co.*, 170 N. Y. 592, 63 N. E. 1116; *affg.* 63 App. Div. (N. Y.) 1, 71 N. Y. Supp. 326.

**34.** *Stewart v. Long Island R. Co.*, 166 N. Y. 604, 59 N. E. 1130; *affg.* 54 App. Div. (N. Y.) 23, 66 N. Y. Supp. 436.

**35.** *Toledo Consol. St. Ry. Co. v. Rohner*, 6 Ohio D. C. 706.

**36.** *West Chicago St. R. Co. v. Williams*, 87 Ill. App. 548.

**37.** *North Chicago St. R. Co. v. Kaspers*, 85 Ill. App. 316; *affd.*, 186 Ill. 246, 57 N. E. 849.

**38.** *Jackson v. St. Louis S. W. R. Co.*, 52 La. Ann. 1706, 28 So. 241.

the accident and but \$9 a week thereafter, and had sustained a fracture of three ribs, which had resulted in an adhesion permanently limiting his powers of respiration and capacity for labor.<sup>39</sup>

\$22,500. Where plaintiff, a boy of eleven years, was injured by a street car, from which he suffered two amputations and the loss of one limb above the knee.<sup>40</sup>

\$3,500. Where plaintiff was badly bruised on the leg, knee, thigh, and hip, and a portion of the extensor muscle was torn from the kneecap, which necessitated the use of a crutch, and was, in the opinion of experts, permanent.<sup>41</sup>

\$8,000. Where plaintiff was confined to her bed for many weeks and used crutches for three months and had not fully recovered eighteen months afterward, and probably never would be completely restored to health.<sup>42</sup>

\$7,000. Where plaintiff was twenty-eight years of age, earned \$20 a month with board, washing, etc., lost one of his legs below the knee, was idle about a year, and again at work earning \$5 with board.<sup>43</sup>

\$10,000. Where a man suffered a fracture of the skull, his ear drum was broken, was partially paralyzed, etc., which would ultimately cause death.<sup>44</sup>

\$5,000. For death of strong, healthy farmer, fifty years of age, cultivating a farm of fifty-seven acres, and earning and expending \$1,000 a year in support of wife and nine children.<sup>45</sup>

\$912. For a broken leg and disability lasting eleven months.<sup>46</sup>

\$12,000. For injury to a girl six years old, who lost her left

**39.** *Keiffert v. Nassau Elec. R. Co.*, 51 App. Div. (N. Y.) 301, 64 N. Y. Supp. 922.

**40.** *Williamson v. Brooklyn H. R. Co.*, 53 App. Div. (N. Y.) 399, 65 N. Y. Supp. 1054.

**41.** *Witrak v. Nassau Elec. R. Co.*, 52 App. Div. (N. Y.) 234, 65 N. Y. Supp. 257.

**42.** *Deming v. Terminal Ry. of Buffalo*, 49 App. Div. (N. Y.) 493, 63 N. Y. Supp. 615.

**43.** *Eberhardt v. Met. St. Ry. Co.*, 69 App. Div. (N. Y.) 560, 75 N. Y. Supp. 46.

**44.** *Hoyt v. Met. St. Ry. Co.*, 73 App. Div. (N. Y.) 249, 76 N. Y. Supp. 832, citing *De Wardener v. Met. St. Ry. Co.*, 1 App. Div. (N. Y.) 240, 37 N. Y. Supp. 133.

**45.** *Buckley v. N. Y. & N. S. Ry. Co.*, 73 App. Div. (N. Y.) 587, 77 N. Y. Supp. 128.

**46.** *Ryan v. Third Ave. R. Co.*, 36

arm below the elbow, and had her nervous system seriously affected.<sup>47</sup>

\$25,000. For causing the death of a man thirty-eight years old and holding the position of battalion chief in a city fire department at a salary of \$3,300, which was the only support of his family of three persons.<sup>48</sup>

\$3,000. For seriously injuring a passenger causing her confinement in a hospital for six weeks, and leaving her with one leg permanently shortened, with a stiff joint.<sup>49</sup>

\$17,793.33. Where a minor, nineteen years old, was so injured that his left arm and left leg were necessarily amputated.<sup>50</sup>

\$5,000. Where plaintiff was confined to his home three months, paid \$104 for repairing his carriage, \$450 physician's fees, and \$1,000 for an assistant to perform his work during his absence from business.<sup>51</sup>

\$1,250. Where plaintiff required medical attendance for five weeks.<sup>52</sup>

\$500. Where plaintiff thrown from wagon, beneath his horse, was cut, bruised, and badly frightened and defendant was guilty of gross negligence.<sup>53</sup>

\$12,000. Where a conductor was permanently crippled, and rendered almost helpless, with a stiffening and immobility of one arm and a false joint, from a compound fracture, leaving him less than one-tenth of normal use of arm.<sup>54</sup>

Misc. Rep. (N. Y.) 849, 74 N. Y. Supp. 1144.

47. *Lafferty v. Third Ave. R. Co.*, 1 St. Ry. Rep. 605, 85 App. Div. (N. Y.) 592, 83 N. Y. Supp. 405.

48. *Lane v. Brooklyn H. R. Co.*, 85 App. Div. (N. Y.) 85, 82 N. Y. Supp. 1057, citing *Thomas v. Union Ry. Co.*, 18 App. Div. (N. Y.) 185, 45 N. Y. Supp. 920.

49. *Bente v. Metropolitan St. Ry. Co.*, 90 App. Div. (N. Y.) 213, 86 N. Y. Supp. 85.

50. *Mendizabal v. New York Cent.*

& H. R. R. Co., 89 App. Div. (N. Y.) 386, 85 N. Y. Supp. 896.

51. *North Chicago St. R. Co. v. Zeiger*, 182 Ill. 9, 54 N. E. 1006; affg. 78 Ill. App. 463.

52. *Clegg v. Met. St. Ry. Co.*, 159 N. Y. 550, 54 N. E. 1089; affg. 1 App. Div. (N. Y.) 207, 37 N. Y. Supp. 130.

53. *Nashville St. R. Co. v. O'Bryan*, 104 Tenn. 28, 55 S. W. 300.

54. *North Chicago St. R. Co. v. Dudgeon*, 83 Ill. App. 528.

\$2,500. Where collar bone was permanently dislocated and plaintiff was unable to fully perform her household duties.<sup>55</sup>

\$1,350. For pain and suffering to a married woman of advanced years from severe permanent injuries to arm and wrist.<sup>56</sup>

\$3,500. Where plaintiff's leg was permanently stiffened, preventing her from performing her duties as a housewife.<sup>57</sup>

\$9,000. For death of a member of the police force of New York city, forty-three years old, in good health, and receiving a salary of \$1,250 a year, with five children dependent upon him for support.<sup>58</sup>

\$3,000. Where plaintiff was injured so that he could not walk for four or five months without a crutch or cane, and leg is permanently weakened.<sup>59</sup>

\$9,000. For unusually severe and permanent injuries to a person forty-two years old, earning regularly from \$60 to \$125 per month, by which he is rendered totally unfit to pursue his trade.<sup>60</sup>

\$2,000. Where the hearing of one of plaintiff's ears was permanently destroyed, the sight of one eye impaired, and he sustained a nervous shock from which he might never recover.<sup>61</sup>

\$16,500. For injury to a street car conductor, forty-five years old, earning from \$80 to \$90 a month, and who had before him the prospect of making his own career, by which his capacity for every kind of employment is seriously impaired.<sup>62</sup>

\$2,000. For an injury to a five-year-old child consisting of fracture of the thigh bone, causing permanent shortening of the limb.<sup>63</sup>

55. Calumet Elec. St. Ry. Co. v. Jennings, 83 Ill. App. 612.

56. Bading v. Milwaukee Elec. Ry. & L. Co., 105 Wis. 480, 81 N. W. 861.

57. North Chicago St. R. Co. v. Schwartz, 82 Ill. App. 493.

58. Wallace v. Third Ave. R. Co., 36 App. Div. (N. Y.) 57, 55 N. Y. Supp. 132, 5 Am. Neg. Rep. 215.

59. West Chicago St. R. Co. v. Johnson, 77 Ill. App. 142; affd., 180 Ill. 285, 54 N. E. 334.

60. Houston City St. R. Co. v. Medlenka, 17 Tex. Civ. App. 621, 43 S. W. 1028.

61. Clare v. Sacramento Elec. P. & L. Co., 122 Cal. 504, 5 Am. Neg. Rep. 115, 55 Pac. 326.

62. Chicago City R. Co. v. Leach, 80 Ill. App. 354.

63. Met. West Side Elev. R. Co. v. Kersey, 80 Ill. App. 301, 4 Chic. L. J. Wkly. 112.

\$3,750. Where plaintiff was a healthy woman before the accident and suffered severe and permanent injuries.<sup>64</sup>

\$5,000. For the death of a healthy young man who had been supporting his family although out of employment at the time of his death.<sup>65</sup>

\$5,000. For permanent injury to hip joint of strong, healthy woman, thirty-five years old.<sup>66</sup>

\$25,000. For injuries rendering one permanently deaf in one ear, the lobe of which was torn away, and health generally impaired.<sup>67</sup>

\$3,000. For death of five-year-old boy.<sup>68</sup>

\$3,500. For death of a bright, healthy boy, seven years old.<sup>69</sup>

\$6,000. For injuries to a child eight years old, where her face was cut open and permanently disfigured, and she was unable to masticate her food on that side of her mouth, and her collar bone and four ribs were broken and her pelvis injured.<sup>70</sup>

\$15,000. For injury to a boy who was run over by a car and one of his legs crushed so that amputation was necessary.<sup>71</sup>

**64.** *Rippe v. Met. St. Ry. Co.*, 35 App. Div. (N. Y.) 321, 54 N. Y. Supp. 958.

**65.** *San Antonio St. R. Co. v. Renken*, 15 Tex. Civ. App. 229, 38 S. W. 829.

**66.** *North Chicago St. R. Co. v. Brown*, 76 Ill. App. 654.

**67.** *West Chicago St. R. Co. v. Lups*, 74 Ill. App. 420.

**68.** *West Chicago St. R. Co. v. Waniata*, 68 Ill. App. 481; *affd.*, 169 Ill. 17, 48 N. E. 437.

**69.** *Heinz v. Brooklyn H. R. Co.*, 91 Hun (N. Y.) 640, 71 St. Rep. (N. Y.) 623, 36 N. Y. Supp. 675.

**70.** *Bennett v. Brooklyn H. R. Co.*, 1 App. Div. (N. Y.) 205, 37 N. Y. Supp. 447.

**71.** *Roth v. Union Depot R. Co.*, 13 Wash. 525, 31 L. R. A. 855, 43 Pac. 641, 44 Pac. 253.

**Damages recovered for loss of**

**leg:** See *Chicago City R. Co. v. Wilcox*, 33 Ill. App. 450 (\$15,000, boy six years old); *Hinton v. Cream City R. Co.*, 65 Wis. 323, 27 N. W. 147 (\$5,000); *Murray v. Brooklyn City R. Co.*, 27 St. Rep. (N. Y.) 280 (\$18,000, also loss of use of arm); *Richmond v. Second Ave. R. Co.*, 76 Hun (N. Y.) 233, 27 N. Y. Supp. 780 (\$9,000); *Ackersloot v. Second Ave. R. Co.*, 40 St. Rep. (N. Y.) 231; *affd.* on other grounds, 131 N. Y. 599, 15 L. R. A. 489, 30 N. E. 195 (\$12,000, child); *Ehrman v. Brooklyn City R. Co.*, 33 St. Rep. (N. Y.) 990 (\$25,000, child three and one-half years).

**Damages recovered for loss of foot:** See *Fox v. Brooklyn City R. Co.*, 7 Misc. Rep. (N. Y.) 285, 27 N. Y. Supp. 895 (\$2,500); *Elliott v. Newport St. R. Co.*, 18 R. I. 707, 23 L. R. A. 208 (\$6,950).

\$5,000. To a waiter in a restaurant for injuries caused by kicks in the abdomen and groin resulting in great suffering, requiring a painful surgical operation and treatment in hospital for six weeks.<sup>72</sup>

§ 512. **Damages excessive.** — A verdict will be set aside where there is no evidence to support it, or where, though there be some evidence in its support, still the great weight of the evidence is against it, and that weight is so reinforced by all the reasonable probabilities and inferences that it becomes overwhelming.<sup>73</sup>

Damages have been set aside as excessive in cases as follows:

\$28,500. Where a pregnant woman passenger's premature confinement resulted from the accident, and at the time of the trial she was paralyzed on her right side, and was unable to control the sphincter muscles, and there was a conflict in the expert evidence, both as to the cause and the permanency of the injuries.<sup>74</sup>

\$6,000. Where an injured passenger was absent from his regular work for less than two months, after which he continued doing full service, receiving full pay, and on application for promotion as a fireman, passed the physical examination, and partially succeeded in various difficult athletic feats, although granted on the ground that he could not work as he used to do, that his nervous system was affected, his back and leg stiff, and his hearing and eyesight impaired.<sup>75</sup>

\$3,000. Where the injuries suffered by plaintiff were a scalp

**What excessive:** *Pfeffer v. Buffalo R. Co.*, 4 Misc. Rep. (N. Y.) 465, 24 N. Y. Supp. 490 (\$20,000). Damages for permanent impairment of hearing and eyesight of child ten years old (\$6,000), not excessive. *Hunt v. St. Paul City Ry. Co.*, 1 St. Ry. Rep. 413, 89 Minn. 448, 95 N. W. 312.

**72.** *Niendorf v. Manhattan R. Co.*, 4 App. Div. (N. Y.) 46, 38 N. Y. Supp. 690.

**73.** *Hirte v. Eastern Wisconsin*

*Ry. & L. Co.*, 127 Wis. 230, 4 St. Ry. Rep. 1072, 106 N. W. 1068.

**74. Damages set aside:** *Fawdrey v. Brooklyn H. R. Co.*, 64 App. Div. (N. Y.) 418, 72 N. Y. Supp. 283. See *North Chicago St. R. Co. v. Smadraff*, 89 Ill. App. 411; *affd.*, 59 N. E. 527, 189 Ill. 155, where verdict of \$5,000 in similar case was held not excessive.

**75.** *Mullady v. Brooklyn H. R. Co.*, 65 App. Div. (N. Y.) 549, 72 N. Y. Supp. 911, damages reduced to \$4,000.

wound, a wound on the right leg, and a stiff shoulder and back, but there were no bones broken nor internal injuries, and plaintiff was about in ten days, and at work in three weeks, and the habits of plaintiff undoubtedly superinduced many of the causes from which he suffered, instead of the accident.<sup>76</sup>

\$4,965. Where the injury sustained by plaintiff did not affect his earning capacity, and prevented him from performing his customary duties only for a few weeks.<sup>77</sup>

\$1,454. Where a twelve-year-old boy, stealing a ride, was caught by the motorman, who injured him so that he was confined in bed for a month, and a year after was still troubled with his back.<sup>78</sup>

\$15,000. Where plaintiff, a teacher, sustained a dislocation of a cartilage in each knee, with other injuries to her body, was confined to her bed ten weeks, expended \$1,670 for medical services, eighteen months after the accident could not go up and down stairs without pain, and in consequence of her injury had to give up her position as superintendent in a school.<sup>79</sup>

\$20,000. Where a boy, about sixteen years of age, was so injured that amputation of one arm was necessary, and the other so broken and injured that the use was permanently impaired, and he suffered much pain for some time after the injury, though able to be about in four or five weeks; he received an injury to the head and had difficulty in passing urine, which might have been due to an injury to the brain or spine; prior to the injury he was strong and healthy and received one dollar per day.<sup>80</sup>

\$9,000. Where plaintiff was a machinist, twenty-nine years of age, earning from \$47 to \$75 per month, though there was evidence that, since the accident, he had been nervous, sleepless,

**76.** *Hanley v. North Jersey St. Ry. Co.*, (N. J. Sup. Ct.) 47 Atl. 445.

51 App. Div. (N. Y.) 475, 64 N. Y. Supp. 619.

**77.** *Sullivan v. Met. St. Ry. Co.*, 54 App. Div. (N. Y.) 632, 66 N. Y. Supp. 609.

**80.** *Renne v. U. S. Leather Co.*, 107 Wis. 305, 83 N. W. 473. See *North Chicago St. R. Co. v. Zeiger*, 182 Ill. 9, 54 N. E. 1006; *Fye v. Chopin*, 121 Mich. 675, 80 N. W. 897; *Alabama G. S. R. Co. v. Bur-*

**78.** *Birmingham Ry. & Elec. Co. v. Ward*, 124 Ala. 409, 27 So. 471.

**79.** *Kraemer v. Met. St. Ry. Co.*,

and troubled with defective eyesight, hearing and smell, headache and loss of memory, and that he is liable at any time to epilepsy and paresis, the result of a fracture of the skull, since there was also evidence that his chances of recovery were very fair, and that he might be able to do as much work as before the accident.<sup>81</sup>

\$5,000. Where the evidence does not show that plaintiff's injuries have or will affect his earning capacity to any great extent.<sup>82</sup>

\$4,000. Where deceased was less than four years old and no special pecuniary loss is shown.<sup>83</sup>

\$5,000. For death of a child between four and five years of age.<sup>84</sup>

\$10,000. When the recovery is only for pain and suffering, where the injuries are not permanent and the evidence as to the continuance of suffering is indefinite.<sup>85</sup>

\$6,000. For the death of a boy four and a half years old who was ordinarily bright, healthy, affectionate, and obedient.<sup>86</sup>

\$4,000. For injury to the ankle of a woman seventy-five years old, who was previously somewhat feeble, even though she can never walk again without a crutch.<sup>87</sup>

\$2,500. For shock, a sprained wrist, and bruises to a passenger.<sup>88</sup>

\$15,000. For injuries to a person earning twelve dollars per week, although he was confined in the hospital a year, where the

gess, 119 Ala. 555, 25 So. 25; Bennett v. Lumber Co., 77 Minn. 198, 79 N. W. 682; Missouri, K. & T. Ry. Co. v. Turley, 1 Ind. T. 275, 37 S. W. 52.

81. McKenna v. North Hudson County Ry. Co. 64 N. J. L. 106, 45 Atl. 776.

82. Kaplan v. Met. St. Ry. Co., 52 App. Div. (N. Y.) 296, 65 N. Y. Supp. 91.

83. West Chicago St. R. Co. v. Abie, 77 Ill. App. 176.

84. Consol. Traction Co. v. Graham, 62 N. J. L. 90, 40 Atl. 773, 4 Am. Neg. Rep. 660, 17 Nat. Corp.

Rep. 213, 31 Chicago Leg. N. 36, 58 Alb. L. J. 93.

85. Beeker v. Albany R. Co., 35 App. Div. (N. Y.) 46, 54 N. Y. Supp. 395, 5 Am. Neg. Rep. 231, 12 Am. & Eng. R. Cas. N. S. 853.

86. Fox v. Oakland Consol. St. R. Co., 118 Cal. 55, 50 Pac. 25, 9 Am. & Eng. R. Cas. N. S. 825.

87. Johnson v. St. Paul City R. Co., 67 Minn. 260, 36 L. R. A. 586, 69 N. W. 900.

88. Lake St. Elev. R. Co. v. Johnson, 70 Ill. App. 413, 2 Chic. L. J. Wkly. 433.

only permanent injury was varicose veins, preventing him from doing hard and heavy work, but not rendering him unable to use his leg with care.<sup>89</sup>

\$500.05. Ejection of passenger, where the conductor did not use any force, or harsh or abusive or insulting language, although he talked rather loud, and the incident attracted the attention of the other passengers in the car.<sup>90</sup>

\$400. Ejection of passenger from car, in case of dispute as to amount of fare, with no physical force or undue display of authority or physical injury, whereby she was prevented from keeping a business engagement with some music scholars, had to walk nine squares to return home, and was caused humiliation in the sight of other passengers.<sup>91</sup>

§ 513. **Damages reduced.** — Damages have been reduced by the courts in the following cases:

From \$8,000 to \$5,000. Where a person injured by reason of a railroad's negligence was not a skilled laborer, and had no trade, and at the time of his injuries was forty years of age, and was able to earn \$25 per month when working by the month, or \$1.50 per day, as the fact that he was permanently injured so as to deprive him from ability to labor in the future, did not justify such a verdict.<sup>92</sup>

From \$8,250 to \$6,000. In an action for the death of a fireman, forty-six years of age, healthy and able to work, and earning \$1,000 a year, where it appeared that deceased had accumulated about \$2,000 and that he had no source of income aside from his personal earnings.<sup>93</sup>

From \$7,000 to \$5,000. Where plaintiff, a carpet sewer, earn-

**89.** *Chapman v. Atlantic Ave. R. Co.*, 14 Misc. Rep. (N. Y.) 404, 35 N. Y. Supp. 1045, 70 St. Rep. (N. Y.) 753.

**90.** *Camden Interstate Ry. Co. v. Frazier*, 30 Ky. L. Rep. 186, 5 St. Ry. Rep. 317, 97 S. W. 776.

**91.** *Dayton & W. Traction Co. v.*

*Marshall*, 36 Ind. App. 491, 4 St. Ry. Rep. 830, 75 N. E. 824.

**92.** *Jones v. Niagara Junction Ry. Co.*, 63 App. Div. (N. Y.) 607, 71 N. Y. Supp. 647.

**93.** *Engvall v. Des Moines City Ry. Co.*, (Iowa) 6 St. Ry. Rep. 440, 121 N. W. 12.

ing \$8 per week, sustained a fracture of the right fibula and sprained her ankle while alighting from a street car, was incapacitated for her work for seven months, and paid \$185 for medicines and doctor bill, and there was evidence that the injury, which produced ankylosis, was permanent.<sup>94</sup>

From \$1,450 to \$300. Where a conductor ordered the arrest of a passenger by a policeman, he was taken to the station, and, to regain his liberty, was compelled to enter into a recognizance for his appearance on the following day, when he was discharged after the hearing of his statements and the evidence of the policeman, no one appearing to prosecute him.<sup>95</sup>

From \$350 to \$200. Where plaintiff was thrown down, had his clothing torn, and suffered some contusions and lacerations, but had no bones broken nor sprains, and was not confined to bed nor kept from business.<sup>96</sup>

From \$700 to \$400. Where a fifteen-year-old boy suffered bruises and abrasions on the hip, which caused soreness and lameness for a time, but no disease of the hip joint itself.<sup>97</sup>

From \$7,500 to \$3,500. Where plaintiff was made nervous, which her physician testified would disappear within a year, and she had been confined to her bed but three weeks, and since such time she has returned to her work.<sup>98</sup>

From \$2,500 to \$1,200. Where a passenger was assaulted by the conductor and thrown from the car, was not able to work for eight weeks, and since then only able to work eight hours a day, and earn \$8 a week, where before he worked from twelve to fourteen hours a day, and earned from \$10 to \$18 a week; he received a slight scalp wound, had a rib fractured, spit a little blood,

**94.** *Downer v. Met. St. Ry. Co.*, 54 App. Div. (N. Y.) 315, 66 N. Y. Supp. 719.

**95.** *Grayson v. St. Louis Trans. Co.*, 100 Mo. App. 60, 71 S. W. 730.

**96.** *Weiner v. Minneapolis St. Ry. Co.*, 80 Minn. 312, 83 N. W. 181.

**97.** *Durose v. St. Paul City Ry. Co.*, 80 Minn. 512, 83 N. W. 397.

**98.** *Henn v. Long Island R. Co.*, 51 App. Div. (N. Y.) 292, 65 N. Y. Supp. 21. See *Clegg v. Met. St. Ry. Co.*, 159 N. Y. 550, 54 N. E. 1089; affg. 1 App. Div. (N. Y.) 207, 37 N. Y. Supp. 130; *Nashville St. R. Co. v. O'Bryan*, 104 Tenn. 28, 55 S. W. 300.

and suffered a great deal of pain, was apparently cured thirty-three days after the injury and his physician's bill was \$62.<sup>99</sup>

From \$12,000 to \$7,500. For death of a boy twelve years old, earning \$3 a week, which he turned over to his mother.<sup>1</sup>

From \$9,500 to \$5,000. For causing the instant death of a young woman of twenty years, who had not completed her education to qualify her as a teacher of music, she being the only child of her parents, forty-six and forty-four years old respectively.<sup>2</sup>

From \$22,000 to \$17,000. For permanent bodily injuries.<sup>3</sup>

From \$12,000 to \$7,783. Where a physician with a practice of about \$6,000 a year had his leg from the knee down crushed and bruised so that he was confined to his house two months, was obliged to wear a steel plate in his shoe, and his pecuniary loss for two years was substantial.<sup>4</sup>

From \$7,000 to \$3,500. Where plaintiff was fifty-nine years old and worked about half the time as nurse at \$12 to \$15 a week, and was only partially incapacitated.<sup>5</sup>

From \$15,000 to \$5,000. Person seventy years of age, boarding car, thigh bone fractured, laid up for several months, compelled to walk on crutches, and injury likely to result in permanent lameness. Estimated income, \$2,500 a year.<sup>6</sup>

From \$12,500 to \$4,000. For the death of a child three and one-half years old.<sup>7</sup>

**99.** *Forhman v. Consolidated Traction Co.*, 63 N. J. L. 391, 43 Atl. 892.

**1.** *McDonald v. Metropolitan St. Ry. Co.*, 36 Misc. Rep. (N. Y.) 703, 74 N. Y. Supp. 367; *revd. on other grounds*, 75 App. Div. (N. Y.) 559, 78 N. Y. Supp. 284.

**2.** *Kellogg v. Albany & Hudson Ry. & P. Co.*, 72 App. Div. (N. Y.) 321, 76 N. Y. Supp. 85, 11 N. Y. Ann. Cas. 50, *citing Seeley v. N. Y. Cent. & H. R. R. Co.*, 8 App. Div. (N. Y.) 402, 40 N. Y. Supp. 866; *Morris v. Eighth Ave. R. Co.*, 68 Hun (N. Y.) 39, 22 N. Y. Supp. 666; *Jones v. Niagara Junction Ry. Co.*, 63 App.

Div. (N. Y.) 607, 71 N. Y. Supp. 647.

**3.** *McGloin v. Met. St. Ry. Co.*, 71 App. Div. (N. Y.) 72, 75 N. Y. Supp. 593.

**4.** *Herold v. Metropolitan St. Ry. Co.*, 89 App. Div. (N. Y.) 596, 85 N. Y. Supp. 660.

**5.** *Chicago City Ry. Co. v. Anderson*, 182 Ill. 298, 55 N. E. 366; *affg.* 80 Ill. App. 71.

**6.** *Devoy v. St. Louis Transit Co.*, 192 Mo. 197, 4 St. Ry. Rep. 656, 91 S. W. 140.

**7.** *Rice v. Crescent City R. Co.*, 51 La. Ann. 108, 24 So. 701.

From \$8,500 to \$6,000. For the loss of a leg.<sup>8</sup>

From \$3,000 to \$2,500. For the fracture of a left arm which has been permanently impaired, \$250 having been spent for medical services, and plaintiff having been incapacitated from attending to business as customhouse broker.<sup>9</sup>

From \$17,000 to \$6,000. Where plaintiff, twenty-three years of age, and earning \$480 per annum, was injured so that amputation of his leg below the knee was necessary, but was not deprived of doing something to earn a living.<sup>10</sup>

From \$3,500 to \$2,000. For causing the death of a girl four years old.<sup>11</sup>

From \$5,000 to \$2,500. For breaking leg of man sixty-seven years old and weighting 240 pounds.<sup>12</sup>

From \$10,000 to \$7,500. For death of a passenger fifty-three years old, in good health, receiving \$2.50 per day.<sup>13</sup>

From \$4,300 to \$3,300. For an injury, not permanent, to a boy seventeen years old, earning from \$10 to \$12 a week.<sup>14</sup>

From \$4,500 to \$2,000. For personal injuries where no bones were broken and there was no deformity or disfigurement.<sup>15</sup>

From \$20,000 to \$7,500. For serious injuries to a married woman, thirty-two years old, resulting in uterine and other painful difficulties which are probably curable.<sup>16</sup>

From \$25,000 to \$15,000. Where the left arm of a person was badly injured and permanently impaired, a difficult surgical oper-

8. *Conway v. New Orleans City & L. R. Co.*, 51 La. Ann. 146, 5 Am. Neg. Rep. 354, 24 So. 780.

9. *Thomas v. Consol. Traction Co.*, 62 N. J. L. 36, 6 Am. Neg. Rep. 122, 42 Atl. 1061.

10. *Stucke v. Orleans R. Co.*, 50 La. Ann. 188, 23 So. 342.

11. *West Chicago St. R. Co. v. Scanlon*, 63 Ill. App. 626, 2 Chic. L. J. Wkly. 113; *affd.*, 168 Ill. 34, 48 N. E. 148.

12. *North Chicago St. R. Co. v. Wiswell*, 68 Ill. App. 443; *affd.*, 168 Ill. 613, 48 N. E. 407.

13. *Taylor v. Long Island R. Co.*, 16 App. Div. (N. Y.) 1, 44 N. Y. Supp. 820.

14. *Levitt v. Nassau Elec. R. Co.*, 14 App. Div. (N. Y.) 83, 43 N. Y. Supp. 426.

15. *Meade v. Brooklyn H. R. Co.*, 3 App. Div. (N. Y.) 83, 39 N. Y. Supp. 320.

16. *Hamilton v. Great Falls St. R. Co.*, 17 Mont. 334, 42 Pac. 860, 17 Mont. 351, 43 Pac. 713.

ation costing \$3,500 was necessary, but there was no loss of earnings.<sup>17</sup>

From \$5,500 to \$2,500. Where the plaintiff was severely injured by the breaking of the neck of the thigh bone and suffered much pain, she had never earned to exceed \$5.50 per week, and was only partially disabled for work.<sup>18</sup>

§ 514. **Damages inadequate.** — Where the trial court considers a verdict inadequate it is within its discretion to grant a new trial and to impose a condition that a new trial may be avoided by the payment of a specified sum.<sup>19</sup>

Verdicts for damages have been held inadequate in the following cases:

\$1,000. For injury to plaintiff, resulting in loss of a leg, necessitating idleness for a year, followed by his being able to obtain work paying only \$5 a month and board, while he had previously earned \$20 a month and board.<sup>20</sup>

\$300. In a mother's action for the death of an infant child where the funeral and other expenses amounted to \$181.<sup>21</sup>

\$171. For bodily injuries, where plaintiff was in a hospital one month, lost four months' work, was permanently injured in strength, and incurred medical expenses of \$250.<sup>22</sup>

\$1. Where person convalescing from serious neurasthenia,

17. *De Wardener v. Met. St. Ry. Co.*, 1 App. Div. (N. Y.) 240, 37 N. Y. Supp. 133, 72 St. Rep. (N. Y.) 741.

18. *Foley v. Brunswick Traction Co.*, 1 St. Ry. Rep. 653 (N. J.), 55 Atl. 803.

19. *Ford v. Minneapolis St. Ry. Co.*, 98 Minn. 96, 4 St. Ry. Rep. 525, 107 N. W. 817.

20. *Eberhardt v. Met. St. Ry. Co.*, 69 App. Div. (N. Y.) 500, 75 N. Y. Supp. 46.

21. *Willsen v. Metropolitan St. Ry. Co.*, 74 N. Y. Supp. 774, citing *Morris v. Metropolitan St. Ry. Co.*,

51 App. Div. (N. Y.) 512, 64 N. Y. Supp. 878.

22. *Hurley v. Met. St. Ry. Co.*, 1 St. Ry. Rep. 647, 87 App. Div. (N. Y.) 66, 83 N. Y. Supp. 1082, citing *Morrissey v. Westchester Elec. Ry. Co.*, 30 App. Div. (N. Y.) 424, 51 N. Y. Supp. 945; *Tooker v. Brooklyn H. R. Co.*, 80 App. Div. (N. Y.) 381, 80 N. Y. Supp. 969, wherein a verdict of six cents for injuries to plaintiff's finger by the catching of his ring in the handle bar of the car as he was alighting, a painful wound having been received which had to be dressed by a physician twenty-five times at

about to board a car, was seized by the throat by an employee, pushed about twelve feet into a gutter, and his neck was bruised or cut where the employee's finger dug into his flesh. The marks remained for several days, and the plaintiff's recovery was retarded by the assault.<sup>23</sup>

§750. Was held not inadequate for injuries to a pedestrian disabling him to some extent for a year.<sup>24</sup>

Where plaintiff sues for personal injuries, a judgment on a verdict allowing him the amount of his necessary medical expenses, but nothing for his injuries, will be reversed.<sup>25</sup>

an expense of \$150 for medical services.

**23.** *Ferd v. Minneapolis St. Ry. Co.*, 98 Minn. 96, 4 St. Ry. Rep. 525, 107 N. W. 817.

**24.** *Shreck v. Jersey City H. & P.*

*Ry. Co.*, 1 St. Ry. Rep. 552 (N. J.), 55 Atl. 650.

**25.** *Katz v. Brooklyn H. R. Co.*, 35 Misc. Rep. (N. Y.) 302, 71 N. Y. Supp. 744.

## CHAPTER XXVI.

## The Court and Jury.

SECTION 515. Questions for jury generally.

516. Questions for jury — Actions by passengers — Negligence of company.

517. Questions for jury in other actions.

518. Questions for jury — Contributory negligence.

519. Questions for jury — Contributory negligence of passengers.

520. Instructions to jury generally.

521. Actions for injuries to passengers — Instructions to jury.

522. Instructions to jury in other actions.

523. Instructions to jury — Contributory negligence.

§ 515. Questions for jury generally. — It cannot be correctly said in any case, where the right of trial by jury exists and the evidence presents an actual issue of fact that the court may properly direct a verdict. So long as a question of fact exists, it is for the jury and not for the court. If the evidence is insufficient, or if that which has been introduced is conclusively answered, so that, as a matter of law, no question of credibility or issue of fact remains, then the question being one of law, it is the duty of the court to determine it. But whenever a plaintiff has established facts or circumstances which would justify a finding in his favor, the right to have the issue of fact determined by a jury continues, and the case must ultimately be submitted to it.<sup>1</sup> The circumstances in which a court may direct a nonsuit or a verdict for defendant in this class of cases have been stated by courts in different language.<sup>2</sup> The general rule where negligence or con-

1. McDonald v. Metropolitan St. Ry. Co., 167 N. Y. 66, 69, 60 N. E. 282; revg. 46 App. Div. (N. Y.) 143, 61 N. Y. Supp. 817; Smith v. Metropolitan St. Ry. Co., 66 App. Div. (N. Y.) 600, 73 N. Y. Supp. 254, but the court may properly set aside any other verdict as against the weight of

evidence. In Illinois, special interrogatories, requested upon a material question of fact upon which the testimony was conflicting, should be submitted to the jury. Chicago City Ry. Co. v. Bucholz, 90 Ill App. 440.

2. Farrier v. Colorado Springs.

tributory negligence is the issue is that the question is one for the jury to determine. There are exceptions to the rule, but they are rare, and where no violation of a duty prescribed by a public statute or city ordinance is shown, the case must be exceptional that would warrant the court to declare, as a matter of law, that negligence or contributory negligence had been shown.<sup>3</sup>

**§ 516. Questions for jury — Actions by passengers — Negligence of company.** — Whether the omission or commission of particular acts by a railroad company was negligence as to a passenger is as a general rule a question for the jury, and it is error to charge that the omission to do a certain act was negligence, when not expressly made so by law.<sup>4</sup> When it is reasonably inferable from the facts proven in the case that the passenger was injured through some act or omission of the carrier's servant, which could have been prevented by the exercise of a high degree of care, there the question of the carrier's negligence is for the jury.<sup>5</sup> Whether the failure of a carrier of passengers to employ extremely cautious

Rapid Tr. Ry. Co., 42 Colo. 331, 6 St. Ry. Rep. 560, 95 Pac. 294.

3. *Smith v. St. Louis Transit Co.*, 120 Mo. App. 328, 6 St. Ry. Rep. 786, 97 S. W. 218.

4. *Central of Georgia Ry. Co. v. McKinney*, 116 Ga. 13, 42 S. E. 229.

That negligence of company is ordinarily a question for the jury see cases cited subsequently in this section and also the following cases:

*California.* — *Maxwell v. Fresno City Ry. Co.*, 4 Cal. App. 745, 5 St. Ry. Rep. 50, 89 Pac. 367.

*Illinois.* — *Chicago Union Traction Co. v. May*, 221 Ill. 530, 4 St. Ry. Rep. 206, 77 N. E. 933.

*Kentucky.* — *Louisville Railway Co. v. Williams*, 30 Ky. Law Rep. 493, 5 St. Ry. Rep. 336, 99 S. W. 245.

*Massachusetts.* — *McDonough v. Boston Elev. Ry. Co.*, 191 Mass. 509, 5 St. Ry. Rep. 275, 78 N. E. 141;

*Jordan v. Old Colony St. Ry. Co.*, 190 Mass. 330, 4 St. Ry. Rep. 477, 76 N. E. 909.

*Michigan.* — *Harker v. Detroit United Ry. Co.*, — Mich. —, 6 St. Ry. Rep. 751, 114 N. W. 657.

*Missouri.* — *Wood v. Metropolitan St. Ry. Co.*, 181 Mo. 433, 3 St. Ry. Rep. 540, 81 S. W. 152.

*New York.* — *Murphy v. Interurban St. Ry. Co.*, 105 App. Div. 110, 4 St. Ry. Rep. 850, 93 N. Y. Supp. 728; *Craven v. International Ry. Co.*, 100 App. Div. 157, 3 St. Ry. Rep. 714, 91 N. Y. Supp. 625; *Ward v. Metropolitan St. Ry. Co.*, 99 App. Div. 126, 3 St. Ry. Rep. 711, 90 N. Y. Supp. 897.

*Utah.* — *Loufborrow v. Utah Light & R. Co.*, — Utah —, 6 St. Ry. Rep. 749, 94 Pac. 981.

5. *Gottlob v. North Jersey St. Ry. Co.*, — N. J. L. —, 4 St. Ry. Rep. 734, 62 Atl. 1003.

men is a breach of the carrier's duty to exercise the utmost care is *prima facie* a question for the court, and not for the jury, but the question whether such care has been in fact exercised is for the jury.<sup>6</sup> Whether a motorman was acting within the scope of his employment in pushing a newsboy from a car has been held to be a question for the jury.<sup>7</sup> Where a passenger on a dark night stepped into an unguarded hole between two cars and the platform of an elevated railroad station, believing it to be the platform of the car she was about to board, and it was shown that the space between the cars was usually protected by a trellis gate, which at the time of the accident had been removed, the question of the carrier's negligence was for the jury.<sup>8</sup> The question whether a passenger had entirely left the car and thus ceased to be a passenger has been held to be one for the jury.<sup>9</sup> Whether a street railway company was negligent in running an open car so fast around a curve that a passenger was thrown therefrom was a question for the jury.<sup>10</sup> In an action against a street car company for injuries to a passenger, who, immediately after alighting and starting to cross the street behind the car, was struck by another car going in the opposite direction, evidence held to justify submission to the jury of the issue as to whether or not the motorman of the latter car rang the gong when approaching.<sup>11</sup> Where a person is injured by falling off a platform built by the side of a street railroad and used by it, and along which he was walking to secure a seat in the car, the questions whether the platform was in reasonably safe condition, and, if not, whether the plaintiff was injured

6. *Bosque v. Sutro R. Co.*, 131 Cal. 390, 63 Pac. 682.

7. *Barry v. Union Ry. Co.*, 105 App. Div. (N. Y.) 520, 94 N. Y. Supp. 449, 4 St. Ry. Rep. 835.

8. *Lake St. Elev. R. Co. v. Burgess*, 200 Ill. 628, 66 N. E. 215; *affg.* 99 Ill. App. 499.

9. *Chicago Union Traction Co. v. Rosenthal*, 217 Ill. 458, 4 St. Ry. Rep. 198, 75 N. E. 578.

10. *Macy v. New Bedford, M. & B.*

*Ry. Co.*, 182 Mass. 291, 65 N. E. 397. Where plaintiff testified that in a rush of passengers to the rear of the car she either fell off or was shoved off, the case was properly submitted to the jury, though the preponderance of evidence showed that she jumped off. *Choquette v. So. El. Ry. Co.*, 80 Mo. App. 515, 2 Mo. App. Rep. 655.

11. *Hornstein v. United Rys. Co.*, 97 Mo. App. 271, 70 S. W. 1105.

in consequence of his own negligence, were for the jury.<sup>12</sup> Where a street car company fails to provide seats or standing room, so that a passenger must stand on the platform, and the company permits him to ride there, the question of its negligence is for the jury where the platform is so crowded that he is liable to be pushed off by an employee operating the car.<sup>13</sup> Where there is disputed evidence as to a car being in motion when the plaintiff attempted to board it, there is a question for the jury.<sup>14</sup> Where two witnesses testified that a street car came to a stop before plaintiff attempted to alight, and suddenly started with a jerk, throwing plaintiff to the ground, while defendant's witnesses testified that plaintiff attempted to alight while the car was in motion, the question of defendant's negligence and plaintiff's contributory negligence were for the jury.<sup>15</sup> Where a street car comes to a full stop on reaching a crossing, the conductor having announced a transfer point, the act of the motorman in starting the car without signal received therefor, and without looking around to discover whether any one is in the act of alighting, whereby a passenger, partially alighted, is thrown and injured, may constitute negligence, the question being for the jury.<sup>16</sup> In an action for injuries to a passenger sitting on the platform of an electric car, with his feet on the lower step, whether the motorman was guilty of negligence in running the car forward when a truck had just pulled off the track and was so near that it struck the passenger, was a question for the jury.<sup>17</sup> In an action for injuries to a passenger caused by the breaking of an appliance underneath the car, where defendant's evidence showed, not only that it purchased the appliance from a reputable dealer, but also that it had daily

**12.** *Haselton v. Portsmouth, K. & Y. St. Ry.*, 71 N. H. 589, 53 Atl. 1016.

**13.** *Cattano v. Met. St. Ry. Co.*, 173 N. Y. 565, 66 N. E. 563.

**14.** *Jacques v. Sioux City Traction Co.*, 124 Iowa 257, 3 St. Ry. Rep. 249, 99 N. W. 1069.

**15.** *Schilling v. Union Ry. Co.*, 77 App. Div. (N. Y.) 74, 78 N. Y. Supp. 1015; *Koues v. Metropolitan St. Ry.*

*Co.*, 86 App. Div. (N. Y.) 611, 83 N. Y. Supp. 380; *Willis v. Metropolitan St. Ry. Co.*, 63 App. Div. (N. Y.) 332, 71 N. Y. Supp. 554.

**16.** *Bessenger v. Met. St. Ry. Co.*, 79 App. Div. (N. Y.) 32, 79 N. Y. Supp. 1017.

**17.** *Seller v. Market Street Ry. Co.*, 139 Cal. 268, 72 Pac. 1006.

inspection of the same by an expert employed for that purpose, and plaintiff offered no evidence in rebuttal, relying wholly on the doctrine of *res ipsa loquitur*, a verdict for defendant was supported.<sup>18</sup> Where a car was suddenly derailed by colliding with a paving stone, which lay between the rails partially covered with snow and slush, and a passenger injured, it was for the jury, not the court, to determine whether the presence of the paving stone might not have been discovered, and the accident avoided, by the exercise of that high degree of care which the law imposes on common carriers for the safety of their passengers.<sup>19</sup> In an action for injury from electric shock, the question as to whether the injury arose from a shock of electricity was for the jury.<sup>20</sup> And when a passenger was injured by jumping from a car which became enveloped in flames and seemed to be all on fire, the question whether the accident was caused by defective insulation, and whether the company used due care in its inspection, was for the jury.<sup>21</sup> Where, in an action by a passenger for injuries, it appears that the car was so crowded that he had to stand in the aisle and hold one of the straps and that the car stopped suddenly, throwing a number of passengers against him with great force, causing the injuries, the declaration is sufficiently supported to make the question one of fact for the jury.<sup>22</sup> Whether a hole in the street at the place of discharging a passenger was the cause of the passenger's injury, and was such a defective place for discharging passengers as to render it obviously unsafe, were questions of fact for the jury.<sup>23</sup> In an action for personal injuries sustained by plaintiff by being thrown from a street car on its jumping the track, where there was evidence that the car at the time was going at a "pretty good rate," and that the accident happened at a

18. *Murray v. Pawtuxet Valley St. Ry. Co.*, 25 R. I. 209, 55 Atl. 491.

19. *Dusenbury v. North Hudson County Ry. Co.*, 66 N. J. L. 44, 48 Atl. 520.

20. *Buckbee v. Ninth Ave. R. Co.*, 64 App. Div. (N. Y.) 360, 72 N. Y. Supp. 217.

21. *Leonard v. Brooklyn H. R. Co.*, 57 App. Div. (N. Y.) 125, 67 N. Y. Supp. 985.

22. *Chicago City Ry. Co. v. Morse*, 197 Ill. 327, 64 N. E. 304; affg. 98 Ill. App. 662.

23. *Sweet v. Louisville Ry. Co.*, 23 Ky. L. Rep. 2279, 64 S. W. 4.

point where there were sidetracks leading into the car stables, the question of defendant's negligence was for the jury.<sup>24</sup> In an action by a woman against a street railway company for injuries sustained in mounting a street car, the case is for the jury where the evidence tends to show that plaintiff approached the car from the side on which was a second track, and from behind a car passing on that track; that she believed the car stopped in response to her signal; and that, as soon as she stepped up on the step, the car started, resulting in plaintiff's injuries.<sup>25</sup> In a suit by a passenger for personal injuries, where plaintiff testified that the car came to a stop, and that while he was attempting to alight it started, suddenly throwing him to the ground, it was error to dismiss the complaint notwithstanding that five of defendant's employees and three apparently disinterested passengers testified that he attempted to alight before the car came to a stop, the case being for the jury.<sup>26</sup> Where plaintiff, while waiting at a street car station in a park to take a car, was struck by persons riding on the car platform, and thrown under the car, and there is evidence that there were one hundred and fifty waiting for the car, which would carry about half that number; that the car entered the station at a dangerous rate of speed; that the number at the station was not unusual; and that there was no person or officer at the gateway or station to control or direct the movements of the crowd, the question of the company's negligence was for the jury.<sup>27</sup> It is the duty of persons in charge of a street car to give passengers carrying bundles a reasonable opportunity to alight; and the question whether this was done in a particular case is an issue of fact, which cannot be withheld from the jury, as there is no fixed measure of care which can be declared by the court as matter of law.<sup>28</sup> Where a street car stops to receive a passenger, it is

**24.** *Hollahan v. Met. St. Ry. Co.*, 73 App. Div. (N. Y.) 751, 76 N. Y. Supp. 751.

**25.** *Austrian v. United Trac. Co.*, 19 Pa. Super. Ct. 329.

**26.** *Steinly v. Met. St. Ry. Co.*, 69 App. Div. (N. Y.) 85, 74 N. Y. Supp.

482. And see *Wash. v. Yonkers R. Co.*, 63 App. Div. (N. Y.) 315, 71 N. Y. Supp. 594.

**27.** *Muhlhouse v. Monongahela St. Ry. Co.*, 201 Pa. St. 237, 50 Atl. 937.

**28.** *Machen v. Pittsburg W. E. Pass. Ry. Co.*, 13 Pa. Super. Ct. 642.

the duty of the company to allow a reasonable time in which to get on the car in safety; and, in the event of injury resulting to such passenger by premature starting of the car, the question of negligence is properly for the jury.<sup>29</sup> Where, in a suit for personal injuries against a street railway, the evidence as to the negligence of defendant and plaintiff, and whether plaintiff was a passenger at the time she was injured, is conflicting, the question is one of fact for the jury.<sup>30</sup> In an action by a passenger for injuries sustained in a panic in a car, the question of defendant's negligence is for the jury, where the motorman, after an explosion of the controller and when he was in no danger, abandoned his post, and, in full view of the passengers, many of whom were woman and children, jumped over the back of the front seat, among the passengers, leaving the car to run uncontrolled and apparently on fire.<sup>31</sup> Where a passenger on a street car, on alighting at a crosswalk, passed behind the car by the conductor's direction, and was injured by a defect in the pavement, which a municipal ordinance required to be kept in repair by the street car company, the question of its negligence was for the jury.<sup>32</sup> Other cases which have been submitted to the jury are cited in this note.<sup>33</sup> Where there was expert evidence that certain ailments

**29.** *Shuart v. Consol. Traction Co.*, 15 Pa. Super. Ct. 26.

**30.** *Gaffney v. St. Paul City Ry. Co.*, 81 Minn. 459, 84 N. W. 304. See *Cunningham v. Dry Dock, E. B. & B. R. Co.*, 31 Misc. Rep. (N. Y.) 471, 4 N. Y. Supp. 350.

**31.** *Dunlay v. United Traction Co.*, 18 Pa. Super. Ct. 206.

**32.** *Fielders v. North Jersey St. Ry. Co.*, 67 N. J. L. 76, 50 Atl. 533.

**33.** *South Chicago City Ry. Co. v. Dufresne*, 200 Ill. 456, 65 N. E. 1075, injuries received by being thrown from street car; *Berry v. Utica Belt Line St. R. Co.*, 76 App. Div. (N. Y.) 490, 78 N. Y. Supp. 542; *Suse v. Met. St. Ry. Co.*, 79 App. Div. (N. Y.) 587, 80 N. Y. Supp. 177, injury to

passenger in collision with a truck; *Robson v. Nassau Elec. R. Co.*, 80 App. Div. (N. Y.) 301, 80 N. Y. Supp. 698, where a passenger jumped from a car about to collide with a train; *Anderson v. City & Suburban Ry. Co.*, 42 Ore. 505, 71 Pac. 659, passenger riding on footboard injured by coming in contact with the strut of a bridge; *Monroe v. Met. St. Ry. Co.*, 79 App. Div. (N. Y.) 587, 80 N. Y. Supp. 177, passenger thrown down by sudden starting of the car; *Doolin v. Omnibus Cable Co.*, 140 Cal. 369, 73 Pac. 1060, passenger thrown over an embankment by horses suddenly swerving to one side; *Leslie v. Jackson Trac. Co.*, 134 Mich. 518, 96 N. W. 580, 10 Detroit Leg. N. 559, in-

had followed as a natural consequence of an injury received by a passenger, it was held to be a question for the jury whether the wrongful act which caused the injury was the proximate cause of a disease causing death.<sup>34</sup>

§ 517. **Questions for jury in other actions.**—The question whether a street car was at a certain time under control is for the jury.<sup>35</sup> Where the motorman testifies that he had control of the car, and saw the carriage at the side of the track, but did not stop, because he thought there was room to pass, the question whether he was negligent in reaching such conclusion and acting thereon is for the jury.<sup>36</sup> The question whether a street car motorman used ordinary care in the management of his car when a horse in

jury to passenger by reason of car running through an open switch; *Casady v. Old Colony St. Ry. Co.*, 184 Mass. 156, 68 N. E. 10, injury to passenger from the burning out of a fuse; *Keegan v. Third Ave. R. Co.*, 165 N. Y. 622, 59 N. E. 1124; *affg.* 34 App. Div. (N. Y.) 297, 54 N. Y. Supp. 391, passengers injured in collision of car with a wagon; *Smith v. Met. St. Ry. Co.*, 59 App. Div. (N. Y.) 60, 69 N. Y. Supp. 176, passenger on cable car injured by collision caused by a break in the cable; *Fay v. Met. St. Ry. Co.*, 62 App. Div. (N. Y.) 51, 70 N. Y. Supp. 763, plaintiff while boarding a transfer car thrown into a hole by a sudden jerk of the car; *Ericius v. Brooklyn H. R. Co.*, 63 App. Div. (N. Y.) 353, 71 N. Y. Supp. 596, injury to person boarding a train by having his hand caught in gate when conductor closed it; *Whitaker v. Staten Island M. R. Co.*, 72 App. Div. (N. Y.) 468, 76 N. Y. Supp. 548, plaintiff injured by falling from defendant's open trolley car; *Wanzer v. Chippewa Valley Elec. R. Co.*, 108 Wis. 319, 84 N. W. 423,

where plaintiff was injured by jumping from a car when a circuit breaker blew out with a loud explosion and there was a flash of lights in the car, followed by a crash of breaking glass from collision with a wagon loaded with hay; *Hill v. Ninth Ave. R. Co.*, 109 N. Y. 239, plaintiff struck by the pole of a truck which penetrated the front of the car; *O'Neill v. Dry Dock, E. B. & B. R. Co.*, 129 N. Y. 125; *affg.* 59 N. Y. Super. Ct. 123, 36 St. Rep. (N. Y.) 934, 15 N. Y. Supp. 84.

**In the following cases a non-suit was held proper on the evidence:** *Nies v. Brooklyn H. R. Co.*, 68 App. Div. (N. Y.) 259, 74 N. Y. Supp. 41, passengers about to alight thrown from footboard; *Ackerstadt v. Chicago City Ry. Co.*, 194 Ill. 616, 62 N. E. 884 (same).

**34.** *Sallie v. New York City Ry. Co.*, 110 App. Div. (N. Y.) 665, 4 St. Ry. Rep. 845, 97 N. Y. Supp. 491.

**35.** *Sesselmann v. Met. St. Ry. Co.*, 76 App. Div. (N. Y.) 336, 78 N. Y. Supp. 482.

**36.** *O'Leary v. Brockton St. Ry. Co.*, 177 Mass. 187, 58 N. E. 585.

front of the car became frightened at it is for the jury.<sup>37</sup> Street car companies, as their cars approach a street crossing, must sound an alarm; and whether they do so or not is a question of fact for the determination of the jury.<sup>38</sup> Where a pedestrian is injured by a street car, it is a question for a jury as to whether there was a headlight on the car at the time of his injury, and whether its failure to display such headlight was the cause of the injury, and, if no warning was given, whether the failure to give such warning was negligence, and, if so, whether the plaintiff's injury was the result of such negligence.<sup>39</sup> The question whether street car tracks allowed to remain above the level of a street render the street unsafe for ordinary travel is for the jury, in an action against the company for an injury alleged to have been caused thereby.<sup>40</sup> Where a person was injured in crossing a railway track by his wagon tipping over because the rails of the track extended above the surface of the street about three inches, and it appeared that the defendant company had accepted an ordinance providing that the track should not be raised above the surface of the street and that the rails should be so laid and maintained that vehicles of every kind could easily and freely cross the track, it was held that the question of defendant's negligence was properly submitted to the jury.<sup>41</sup> Where in an action against a street railway company to recover damages for the death of a person standing near a switch caused by the car leaving the switch, the only evidence as to the condition of the switch was that it was worn off at the top and that some weeks prior to the accident a driver of a vehicle had a wheel fastened in the switch while driving in an opposite direction from that in which the car in question was going, it was held that the question of the defendant's negligence was for the jury.<sup>42</sup> Whether or not a motorman of a street car

**37.** *Oates v. Met. St. Ry. Co.*, 168 Mo. 535, 68 S. W. 906.

**38.** *Potter v. O'Donnell*, 199 Ill. 119, 64 N. E. 1026; *affg.* 101 Ill. App. 546.

**39.** *Canfield v. North Chicago St. R. Co.*, 98 Ill. App. 1.

**40.** *Cray v. Washington Water*

*Power Co.*, 27 Wash. 713, 68 Pac. 360; *Schild v. Central Park, N. & E. R. Co.*, 133 N. Y. 446, 31 N. E. 327.

**41.** *Baumgartner v. City of Mankato*, 60 Minn. 244, 62 N. W. 127.

**42.** *Geiser v. Pittsburg Ry. Co.*, 233 Pa. St. 170, 72 Atl. 315.

was negligent in turning his face away from the front of the car was a question for the jury.<sup>43</sup> Whether it is negligence to run street cars on the same track over a public crossing in a city, at an excessive rate of speed, in close proximity to one another, and without giving warning signals, resulting in a collision with a vehicle, is a question for the jury under all the circumstances of the case.<sup>44</sup> Where plaintiff, while at work in a stooping posture on the street between the tracks of a street railway, is struck by a car, and the evidence is conflicting as to whether the speed of the car was reduced in response to a signal given, the question of negligence of both plaintiff and defendant is for the jury.<sup>45</sup> The question whether the facts were sufficient to apprise the motor-man, in time for him to stop the car, by the exercise of ordinary care, before the collision took place, that plaintiff did not intend to leave the track, was for the jury, as was also the question of contributory negligence, and it was therefore error to give a peremptory instruction to find for defendant.<sup>46</sup> It is impossible to state in detail the facts and circumstances which in numerous cases have been submitted to the jury, but many cases in which the courts have held it to be proper to do so are collated in the note, with a brief reference thereto indicating the general character of the case.<sup>47</sup> The question of whether plaintiff went into

**43.** *Sciurba v. Met. St. Ry. Co.*, 73 App. Div. (N. Y.) 170, 76 N. Y. Supp. 772.

**44.** *Marchal v. Indianapolis St. Ry. Co.*, 28 Ind. App. 133, 62 N. E. 286.

**45.** *Third Ave. Ry. Co. v. Krausz*, (U. S. C. C. A., N. Y.) 50 C. C. A. 293, 112 Fed. 379

**46.** *Floyd v. Paducah Ry. & L. Co.*, 23 Ky. L. Rep. 1077, 64 S. W. 653.

**47.** *Birmingham Ry. & Elec. Co. v. Baker*, 132 Ala. 507, 31 So. 618, a hose cart collided with a street car; *Chicago City Ry. Co. v. Tuohy*, 196 Ill. 410, 63 N. E. 997; affg. 95 Ill. App. 314, six-year-old boy run over

by an electric car; *Tri-City Ry. Co. v. Banker*, 100 Ill. App. 6, collision of a street car with a wagon; *Met. St. Ry. Co. v. Slayman*, 64 Kan. 722, 68 Pac. 628, collision with a heavy wagon on street car track at night; *Tunison v. Weadock*, 130 Mich. 141, 89 N. W. 703, 8 Detroit Leg. N. 1183, collision with vehicle driven along track; *Quirk v. Rapid Ry.*, 130 Mich. 654, 90 N. W. 673, 9 Detroit Leg. N. 189, injury to pedestrian crossing track; *Boettcher v. Detroit Citizens' St. Ry. Co.*, 131 Mich. 295, 91 N. W. 125, 9 Detroit Leg. N. 320; *White v. Vicksburgh R. P. & Mfg. Co.*, — Miss. —, 31 So. 709, collision with persons

a position of danger, by reason of which he was struck by defend-

driving along track; *Gumby v. Met. St. Ry. Co.*, 171 N. Y. 635, 63 N. E. 1117, five-year-old child run over by horse car; *Morris v. Met. St. Ry. Co.*, 170 N. Y. 592, 63 N. E. 1119; affg. 63 App. Div. (N. Y.) 78, 71 N. Y. Supp. 321, collision with brougham crossing track; *Hock v. New York & Q. C. Ry. Co.*, 74 App. Div. (N. Y.) 52, 77 N. Y. Supp. 200, pedestrian killed while crossing track; *Haas v. Chester St. Ry. Co.*, 202 Pa. St. 145, 51 Atl. 744, collision with carriage driving in same direction as car; *Fenner v. Wilkes-Barre & W. Va. Trac. Co.*, 202 Pa. St. 365, 51 Atl. 1034, driver killed in collision of wagon with street car; *Byrne v. Montgomery & C. E. Ry.*, 19 Pa. Super. Ct. 531, for loss of horse struck by car; *Nashville Ry. v. Norman*, 108 Tenn. 324, 67 S. W. 479, pedestrian injured; *Aiken v. Holyoke St. Ry. Co.*, 180 Mass. 8, 61 N. E. 557, six-year-old child run over; *Edwards v. Foote*, 129 Mich. 121, 98 N. W. 404, 8 Detroit Leg. N. 880, where horse hitched to a buggy stumbled and fell on the track and was struck by a car; *Doty v. Detroit Citizens' St. Ry. Co.*, 129 Mich. 464, 88 N. W. 1050, 8 Detroit Leg. N. 1001, pedestrian injured; *Laschinger v. St. Paul City Ry. Co.*, 84 Minn. 333, 87 N. W. 836, city employee injured while flushing the streets; *Sesselmann v. Met. St. Ry. Co.*, 65 App. Div. (N. Y.) 484, 72 N. Y. Supp. 1010, passenger who had alighted injured while crossing track; *Pinder v. Brooklyn H. R. Co.*, 65 App. Div. (N. Y.) 521, 72 N. Y. Supp. 1082, boy fourteen years old kicked off one car and run over by another; *Brass v. Met. St. Ry. Co.*, 66 App. Div. (N.

Y.) 554, 73 N. Y. Supp. 256, collision with loaded wagon; *Smith v. Met. St. Ry. Co.*, 66 App. Div. (N. Y.) 600, 73 N. Y. Supp. 254, collision with wagon driven across track; *O'Connor v. Union Ry. Co.*, 67 App. Div. (N. Y.) 99, 73 N. Y. Supp. 106, injury to a street sweeper; *Wells v. Brooklyn H. R. Co.*, 67 App. Div. (N. Y.) 212, 74 N. Y. Supp. 196, injury to employee of switch company; *Tupper v. Met. St. Ry. Co.*, 36 Misc. Rep. (N. Y.) 819, 74 N. Y. Supp. 868, injury to pedestrian; *Hernandez v. Met. St. Ry. Co.*, 36 Misc. Rep. (N. Y.) 793, 74 N. Y. Supp. 898, injury to pedestrian; *Copeland v. Met. St. Ry. Co.*, 67 App. Div. (N. Y.) 483, 73 N. Y. Supp. 856 (same); *Dorsch v. Brooklyn H. R. Co.*, 68 App. Div. (N. Y.) 222, 74 N. Y. Supp. 257, injury to boy nine years old; *Seletsky v. Third Ave. R. Co.*, 69 App. Div. (N. Y.) 27, 74 N. Y. Supp. 518, injury to boy fifteen years old riding with feet hanging down on the rear end of a truck; *Handy v. Met. St. Ry. Co.*, 70 App. Div. (N. Y.) 26, 74 N. Y. Supp. 1079, injury to pedestrian; *Manhattan Pie Baking Co. v. Met. St. Ry. Co.*, 36 Misc. Rep. (N. Y.) 855, 74 N. Y. Supp. 928; collision of wagon with car; *Campbell v. Consol. Traction Co.*, 201 Pa. St. 167, 50 Atl. 829 (same); *Hamilton v. Consol. Trac. Co.*, 201 Pa. St. 351, 50 Atl. 946, collision with wagon crossing track; *Nolder v. McKeesport, W. & D. Ry. Co.*, 201 Pa. St. 169, 50 Atl. 948, injury to child; *Hooper v. United Traction Co.*, 17 Pa. Super. Ct. 638, injury to child; *Burian v. Seattle Elec. Co.*, 26 Wash. 606, 67 Pac. 214, collision with pedestrian; *Chisholm v. Seattle Elec. Co.*, 27 Wash. 237, 67 Pac. 601, collision

with pedestrian; *Plant v. Heraty*, 131 Mich. 619, 92 N. W. 284, 9 Detroit Leg. N. 477, person injured driving across track, *Larkin v. United Traction Co.*, 76 App. Div. (N. Y.) 238, 78 N. Y. Supp. 538, death of child; *Connor v. Met. St. Ry. Co.*, 77 App. Div. (N. Y.) 384, 79 N. Y. Supp. 294, person injured while riding on rear of truck; *Giese v. Milwaukee Elec. Ry. & L. Co.*, 116 Wis. 66, 92 N. W. 356, driver of coal wagon killed; *Central Ry. Co. v. Knowles*, 191 Ill. 241, 60 N. E. 829; affg. 93 Ill. App. 419, collision with team; *Chicago City Ry. Co. v. Anderson*, 193 Ill. 9, 61 N. E. 999; affg. 93 Ill. App. 419, collision with team; *United Rys. & El. Co. v. Seymour*, 92 Md. 425, 48 Atl. 850, collision with loaded vehicle driving along street car track; *Oddie v. Mendenhall*, 84 Minn. 58, 86 N. W. 881, collision with vehicle; *Woodland v. North Jersey St. Ry. Co.*, 66 N. J. L. 455, 49 Atl. 683 (same); *Markey v. Consol. Traction Co.*, 65 N. J. L. 82, 48 Atl. 1117; affg. 46 Atl. 573, injury to four-year-old child; *North Jersey St. Ry. Co. v. Schwartz*, 66 N. J. L. 437, 49 Atl. 683, collision with carriage; *Countryman v. F., J. & G. R. Co.*, 166 N. Y. 201, 59 N. E. 822, collision of cutter with car; *Lawson v. Met. St. Ry. Co.*, 166 N. Y. 589, 59 N. E. 1124; affg. 40 App. Div. (N. Y.) 307, 57 N. Y. Supp. 997, collision with heavy wagon; *Halliday v. Brooklyn H. R. Co.*, 59 App. Div. (N. Y.) 57, 69 N. Y. Supp. 174, injury to pedestrian; *Gildea v. Met. St. Ry. Co.*, 58 App. Div. (N. Y.) 525, 69 N. Y. Supp. 568, injury to pedestrian; *Brennan v. Met. St. Ry. Co.*, 60 App. Div. (N. Y.) 264, 69 N. Y. Supp. 1025, collision with delivery wagon; *Schwartzbaum v. Third Ave. R. Co.*, 60 App. Div. (N. Y.) 274, 69 N. Y.

Supp. 1095, injury to pedestrian; *Johnson v. Rochester Ry. Co.*, 61 App. Div. (N. Y.) 12, 70 N. Y. Supp. 113, collision of wagon with street car; *Weingartner v. Met. St. Ry. Co.*, 62 App. Div. (N. Y.) 364, 70 N. Y. Supp. 1113, injury to workman pushing an iron beam into building; *Mitchell v. Third Ave. R. Co.*, 62 App. Div. (N. Y.) 371, 70 N. Y. Supp. 1118, injury to pedestrian on crosswalk; *Cohen v. Met. St. Ry. Co.*, 63 App. Div. (N. Y.) 165, 71 N. Y. Supp. 268, injury to one crossing track; *Morris v. Met. St. Ry. Co.*, 63 App. Div. (N. Y.) 78, 71 N. Y. Supp. 321, occupant of brougham killed; *Griffith v. Met. St. Ry. Co.*, 63 App. Div. (N. Y.) 86, 71 N. Y. Supp. 406, injury to a child seven years old; *G'Sell v. Met. St. Ry. Co.*, 35 Misc. Rep. (N. Y.) 387, 71 N. Y. Supp. 1020, action of husband for injuries to wife by fender catching in her clothes; *Moore v. Charlotte Elec. St. Ry. Co.*, 128 N. C. 455, 39 S. E. 57, collision with vehicle; *Sanford v. Union Pass. Ry. Co.*, 16 Pa. Super. Ct. 393, for death of a horse in a collision; *Stafford v. Chippewa Valley Elec. R. Co.*, 110 Wis. 331, 85 N. W. 1036, plaintiff injured by wagon being struck by street car causing horse to run away, held no question for jury; *Wahlgren v. Market St. Ry. Co.*, 132 Cal. 656, 62 Pac. 308, 64 Pac. 993, injury to pedestrian; *Finley v. West Chicago St. Ry. Co.*, 90 Ill. App. 368, death of boy seven years old; *McNulta v. Norgren*, 90 Ill. App. 419, injury to pedestrian; *Siacik v. Northern Cent. Ry. Co.*, 92 Md. 213, 48 Atl. 149; *Moran v. Detroit, Y. A. A. Ry.*, 124 Mich. 582, 83 N. W. 606, 7 Detroit Leg. N. 343, collision with wagon driven along track; *Mertz v. Detroit Elec. Ry. Co.*, 125 Mich. 11, 83 N. W.

ant's street car, was for the jury.<sup>48</sup> Where it appears that there are three different methods of dispatching interurban electrical trains, and there was testimony that the method used in the case at bar was unsafe and not in use on other roads, there is a question for the jury as to whether such method was reasonably safe; but it is not necessary for the railroad to adopt any particular system of dispatching these trains.<sup>49</sup> It is for the jury to say whether a street railway company used due care in stringing its wires under the wires of a telephone company when a fire in the store is caused by a telephone wire connecting with the store, causing a contact with the trolley wire strung underneath, or as to whether the breaking was due to a storm so severe as to be an "act of God."<sup>50</sup>

1036, 7 Detroit Leg. N. 393, collision with heavily loaded wagon; *McAndrews v. St. Louis & S. Ry. Co.*, 33 Mo. App. 233, injury to pedestrian; *Hughes v. Camden & S. Ry. Co.*, 65 N. J. L. 203, 47 Atl. 441, collision with wagon driven along track; *Gallagher v. Manchester St. Ry. Co.*, 70 N. H. 212, 47 Atl. 610, injury to pedestrian; *Marchal v. Indianapolis St. Ry. Co.*, 28 Ind. App. 133, 62 N. E. 286, collision with vehicle; *Crow v. Met. St. Ry. Co.*, 70 App. Div. (N. Y.) 202, 75 N. Y. Supp. 377; *Hoyt v. Met. St. Ry. Co.*, 73 App. Div. (N. Y.) 249, 76 N. Y. Supp. 832, injuries to pedestrians; *Kernan v. Market St. Ry. Co.*, 137 Cal. 326, 70 Pac. 81; *Consumers' Electric Light & St. R. Co. v. Pryor*, 44 Fla. 354, 32 So. 797; *Chicago City Ry. Co. v. Fennimore*, 190 Ill. 9, 64 N. E. 685; affg. 99 Ill. App. 174, injuries to pedestrians; *Chicago City Ry. Co. v. Sandusky*, 198 Ill. 400, 64 N. E. 990; affg. 99 Ill. App. 164; *Howard v. Indianapolis St. Ry. Co.*, 29 Ind. App. 514, 64 N. E. 890; *Plant v. Heraty*, 131 Mich. 619, 92 N. W. 284, 9 Detroit Leg. N. 477, collisions with wagons; *Gray v. St. Paul City Ry. Co.*, 87 Minn. 280,

91 N. W. 1106, injury to child six years old; *Gebhardt v. St. Louis Trans. Co.*, 97 Mo. App. 373, 71 S. W. 448; *Gildea v. Met. St. Ry. Co.*, 171 N. Y. 660, 64 N. E. 1121; affg. 58 App. Div. (N. Y.) 528, 69 N. Y. Supp. 568, injuries to pedestrians; *Sanitary Dairy Co. v. St. Louis Trans. Co.*, (Mo.) 71 S. W. 726; *Blum v. Met. St. Ry. Co.*, 79 App. Div. (N. Y.) 611, 80 N. Y. Supp. 157, collisions with teams; *Davidson v. Met. St. Ry. Co.*, 75 App. Div. (N. Y.) 426, 78 N. Y. Supp. 352; *Ferri v. Union Ry. Co.*, 77 App. Div. (N. Y.) 301, 79 N. Y. Supp. 230; *Levine v. Met. St. Ry. Co.*, 78 App. Div. (N. Y.) 426, 80 N. Y. Supp. 48; *Bortz v. Dry Dock, E. B. & B. R. Co.*, 78 App. Div. (N. Y.) 386, 79 N. Y. Supp. 1046, collisions with children; *Atherton v. Tacoma R. & P. Co.*, 30 Wash. 395, 71 Pac. 39, collision with team; *Ford v. Met. St. R. Co.*, (Can.) 4 Ont. L. Rep. 29.

48. *Traver v. Spokane St. Ry. Co.*, 25 Wash. 225, 65 Pac. 284.

49. *Sipes v. Puget Sound Elec. Ry.*, 54 Wash. 47, 6 St. Ry. Rep. 697, 102 Pac. 1057.

50. *Richmond & P. Elec. Ry. Co.*

Rules and regulations may be so full and complete that a court may declare them reasonable and sufficient as a matter of law, or they may be so faulty and defective that a court will not hesitate to declare them unreasonable and deficient as a matter of law, but between these extremes there is of necessity a debatable ground where the question of the reasonableness and sufficiency of rules and regulations is a mixed question of law and fact to be determined by the jury under proper instructions from the court.<sup>51</sup>

**§ 518. Questions for jury — Contributory negligence generally.**

— The question of contributory negligence will not be taken from the jury unless the conduct of the plaintiff relied on as amounting in law to contributory negligence is established by clear and uncontradicted evidence.<sup>51a</sup> When the nature of the act relied on to show contributory negligence can only be determined by considering all the circumstances attending the transaction, it is within the province of the jury to characterize it.<sup>52</sup> When the facts are not disputed, and the inferences and conclusions resulting therefrom are indisputable, the question of contributory negligence is one of law for the court to determine.<sup>53</sup> The question of plaintiff's contributory negligence in attempting to drive across street railroad tracks, resulting in an accident, held, under the evidence, to be for the jury.<sup>54</sup> There being no fixed duty to stop

v. Rubin, 102 Va. 809, 3 St. Ry. Rep. 870, 47 S. E. 834.

**51.** Sipes v. Puget Sound Elec. Ry., 54 Wash. 47, 6 St. Ry. Rep. 697, 102 Pac. 1057.

**51a.** Strauss v. United Rys. & Elec. Co., 101 Md. 497, 4 St. Ry. Rep. 396, 61 Atl. 137.

**52.** Strauss v. United Rys. & Elec. Co., 101 Md. 497, 4 St. Ry. Rep. 396, 61 Atl. 137. See also Fort Smith Light & Traction Co. v. Carr, 78 Ark. 279, 4 St. Ry. Rep. 44, 93 S. W. 990; Patterson v. San Francisco & S. M. Elec. Ry. Co., 147 Cal. 178, 4 St. Ry.

Rep. 44, 81 Pac. 531; O'Brien v. Brooklyn Heights R. Co., 109 App. Div. (N. Y.) 833, 4 St. Ry. Rep. 853, 96 N. Y. Supp. 857; Craven v. International Ry. Co., 100 App. Div. (N. Y.) 157, 3 St. Ry. Rep. 714, 91 N. Y. Supp. 625; Ward v. Metropolitan St. Ry. Co., 99 App. Div. (N. Y.) 126, 3 St. Ry. Rep. 711, 90 N. Y. Supp. 897.

**53.** Bridges v. Jackson Electric Ry., L. & P. Co., 86 Miss. 584, 4 St. Ry. Rep. 547, 38 So. 788.

**54.** Tacoma Ry. & P. Co. v. Hays, (U. S. C. C. A., Wash.) 49 C. C. A. 115, 110 Fed. 496.

before attempting to drive across street car tracks, the question whether a failure to do so is negligence is for the jury.<sup>55</sup> A person about to cross a double-track street railroad, who sees an approaching car on the nearer track about two blocks distant, and one on the farther track about one block distant, is not guilty of contributory negligence, as a matter of law, in passing over the first track, and stopping between the tracks to allow the other car to pass as she is not bound to assume that the car on the first track will traverse twice the distance and reach the crossing before the other car has passed.<sup>56</sup> Under the evidence in an action for injuries received while attempting to drive across defendant's double tracks at a highway crossing, it was held that the case was properly submitted to the jury on the question of plaintiff's contributory negligence, and on that of the cause of the accident being inevitable casualty.<sup>57</sup> Whether a person in a team at a street car crossing, who, because of a curve in the track, was struck by the rear end of a street car swinging out, was guilty of contributory negligence, in not turning to one side after he had backed as far as a car in the rear would allow, is a question for the jury.<sup>58</sup> Where plaintiff was a guest in an automobile and was injured in a collision with a street car, when the automobile turned behind another car on a narrow bridge, and collided with the car in question, and it appeared that the driver not only observed the laws of the road, but that he turned in the only direction where there was room to pass, it was held that plaintiff was not negligent, as matter of law, in failing to warn the driver against taking the course which he did, and plaintiff's negligence, if any, was for the jury.<sup>59</sup> And in the case of a bicyclist riding along or attempting to cross the tracks of a street railway, where the evidence is conflicting, the question of his con-

**55.** Haas v. Chester St. Ry. Co., 202 Pa. St. 145, 51 Atl. 744.

**56.** O'Callaghan v. Met. St. Ry. Co., 69 App. Div. (N. Y.) 574, 75 N. Y. Supp. 171.

**57.** Cook v. Los Angeles & P. Elec. Ry. Co., 134 Cal. 279, 66 Pac. 306.

**58.** Fay v. Brooklyn H. R. Co., 69 App. Div. (N. Y.) 563, 75 N. Y. Supp. 113.

**59.** Chadbourne v. Springfield St. Ry. Co., 199 Mass. 474, 6 St. Ry. Rep. 625, 85 N. E. 737.

tributory negligence is for the jury.<sup>60</sup> Under the evidence the contributory negligence of a child in attempting to cross street car tracks may be a question for the jury.<sup>61</sup> So in an action for injuries to a child six years of age, occasioned by being run over by a street car, it is a question of fact, to be determined by the jury, whether such child was in the exercise of proper care, taking into consideration its tender years, intelligence, and other circumstances of the case.<sup>62</sup> It is a question primarily for the jury to determine whether a person who attempts to cross a street railroad track upon which a car is approaching is guilty of negligence contributing to the injury for which he claims the company is liable.<sup>63</sup> In an action against a street railway company, the question as to whether the plaintiff was guilty of contributory negligence in attempting to cross the street at a place where he was injured is a question for the jury.<sup>64</sup> In an action for personal injuries caused by being struck by a street car where plaintiff testified that he judged the car to be a safe distance away when he attempted to cross the track, and the evidence as to the distance and as to the speed of the car was conflicting, the question of contributory negligence was properly left to the jury.<sup>65</sup> The question of the contributory negligence of the plaintiff, injured by an alleged defect in the paving between the tracks of a street car company, was for the jury.<sup>66</sup> Where a person standing between tracks waiting to board a car was struck by a person

**60.** *Youngquist v. Minneapolis St. Ry. Co.*, 102 Minn. 501, 6 St. Ry. Rep. 737, 114 N. W. 259; *Romeo v. Union Ry. Co.*, 52 Misc. Rep. (N. Y.) 578, 6 St. Ry. Rep. 738, 102 N. Y. Supp. 844.

**61.** *Deschner v. St. Louis & M. R. Co.*, 200 Mo. 310, 5 St. Ry. Rep. 549, 98 S. W. 737. See *Fogarty v. Jersey City, H. & P. Ry. Co.*, 76 N. J. L. 459, 6 St. Ry. Rep. 732, 69 Atl. 964.

**62.** *Chicago City Ry. Co. v. Tuohy*, 196 Ill. 410, 63 N. E. 997; affg. 93 Ill. App. 314; *Goldstein v. Dry Dock,*

*E. B. & B. R. Co.*, 35 Misc. Rep. (N. Y.) 200, 71 N. Y. Supp. 477; *Citizens' St. Ry. Co. v. Hamer*, 29 Ind. App. 426, 63 N. E. 778, 62 N. E. 658.

**63.** *Chicago City Ry. Co. v. Wall*, 93 Ill. App. 411.

**64.** *Canfield v. North Chicago St. R. Co.*, 98 Ill. App. 1.

**65.** *Coleman v. Lowell, L. & H. St. Ry. Co.*, 181 Mass. 591, 64 N. E. 402.

**66.** *Williams v. Minneapolis St. Ry. Co.*, 88 Minn. 79, 92 N. W. 479.

boarding the car just ahead of him the question of his negligence was held to be for the jury.<sup>67</sup>

§ 519. Questions for jury — Contributory negligence of passengers. — In the case of an injury to a passenger the question of his contributory negligence is for the jury where the evidence is conflicting.<sup>68</sup> So whether it is negligence *per se* for a person to attempt to board or alight from a street car while it is in motion is a question of fact for the jury to determine from the attending circumstances,<sup>69</sup> Where a passenger leaves a crowded car and seats himself on the platform steps, from which he is thrown by a sudden jerk of the car, and injured, whether he is negligent is

**67.** *Cunningham v. Metropolitan St. Ry. Co.*, 104 App. Div. (N. Y.) 525, 4 St. Ry. Rep. 840, 93 N. Y. Supp. 700.

**68.** *Alabama.* — *Birmingham Ry., L. & P. Co. v. Bynum*, 139 Ala. 389, 3 St. Ry. Rep. 6, 36 So. 736.

*Colorado.* — *Posten v. Denver Consolidated Tramway Co.*, 20 Colo. App. 324, 3 St. Ry. Rep. 37, 78 Pac. 1067, alighting from car.

*Indiana.* — *Wabash River Traction Co. v. Baker*, 167 Ind. 262, 5 St. Ry. Rep. 258, 78 N. E. 196; *Indiana Union Traction Co. v. Jacobs*, 167 Ind. 85, 5 St. Ry. Rep. 261, 78 N. E. 325, alighting from car; *Union Traction Co. v. Sullivan*, 38 Ind. App. 513, 4 St. Ry. Rep. 240, 76 N. E. 116.

*Kentucky.* — *Louisville Ry. Co. v. Hartman's Adm'r*, 26 Ky. L. Rep. 1174, 3 St. Ry. Rep. 291, 83 S. W. 570, alighting from car.

*Maryland.* — *Topp v. United Rys. & Elec. Co.*, 99 Md. 630, 3 St. Ry. Rep. 332, 59 Atl. 652, alighting from car.

*New York.* — *Butler v. New York City Ry. Co.*, 109 App. Div. 658, 4 St. Ry. Rep. 847, 96 N. Y. Supp. 254.

**69.** *Alabama.* — *Birmingham Ry.*

& El. Co. v. Brannon, 132 Ala. 431, 31 So. 523.

*Delaware.* — *Betts v. Wilmington City Ry. Co.*, 3 Penn. 448, 53 Atl. 358.

*Illinois.* — *Chicago Union Traction Co. v. Olsen*, 211 Ill. 255, 3 St. Ry. Rep. 142, 71 N. E. 985; *South Chicago City R. Co. v. Dufresne*, 200 Ill. 456, 65 N. E. 1075; *Canfield v. North Chicago St. Ry. Co.*, 98 Ill. App. 1; *Bloomington & N. Ry. Co. v. Zimmerman*, 101 Ill. App. 184.

*Indiana.* — *Indianapolis St. R. Co. v. Lawn*, 30 Ind. 515, 66 N. E. 508; *Pittsburgh, C., C. & St. L. Ry. Co. v. Gray*, 28 Ind. App. 588, 64 N. E. 39.

*Iowa.* — *Root v. Des Moines City Ry. Co.*, 113 Iowa 675, 83 N. W. 904.

*New York.* — *Harris v. Union Ry. Co.*, 69 App. Div. (N. Y.) 385, 74 N. Y. Supp. 1012; *Kimber v. Met. St. Ry. Co.*, 69 App. Div. (N. Y.) 353, 74 N. Y. Supp. 966.

It depends on the circumstances whether the court may, as a matter of law, say that it is negligence for a passenger to get on or off a moving car. *Burke v. Bay City Traction Co.*, 147 Mich. 172, 5 St. Ry. Rep. 518, 110 N. W. 524.

for the jury.<sup>70</sup> Where defendant had signs on its cars forbidding passengers to ride on the front platform, but its employees were accustomed to receive passengers in such numbers as to crowd the front platform, and made no objection to passengers riding there, and plaintiff was thrown from the front platform of a car while it was passing a curve, and sustained injuries, the question of plaintiff's contributory negligence was for the jury.<sup>71</sup> Whether or not it is negligence for a person to ride on the running-board of a street car, facing the inside and holding on to the railing, is a question for the jury.<sup>72</sup> The same general rules apply in reference to the submission of questions of fact as to contributory negligence to the jury, as apply in the case of negligence, and such questions arise in the majority of accident cases.<sup>73</sup>

**70.** *Holloway v. Pasadena & P. Ry. Co.*, 130 Cal. 177, 62 Pac. 478.

Whether contributory negligence to stand on steps is a question for jury. *Chicago Consol. Trac. Co. v. Schritter*, 222 Ill. 364, 5 St. Ry. Rep. 182, 73 N. E. 820; *Alton Light & Trac. Co. v. Oliver*, 217 Ill. 15, 4 St. Ry. Rep. 192, 75 N. E. 419.

**71.** *Sweetland v. Lynn & B. R. Co.*, 177 Mass. 574, 51 L. R. A. 783, 59 N. E. 443.

**Contributory negligence** of passenger standing on platform is question for jury. *Wellmeyer v. St. Louis Transit Co.*, 198 Mo. 527, 5 St. Ry. Rep. 627, 95 S. W. 925.

Whether a passenger riding upon a platform or standing there awaiting an opportunity to alight, while the car is moving, should, in the exercise of ordinary care, for his own safety, take hold of the hand-rail there, is for the jury. *Scott v. Bergen Co. Traction Co.*, 64 N. J. L. 362, 48 Atl. 1118.

**72.** *Purinton-Kimball Brick Co. v. Eckman*, 102 Ill. App. 183.

Whether contributory negligence to

stand on running-board is a question for jury:

*Indiana.* — *Fort Wayne Trac. Co. v. Hardendorf*, 164 Ind. 403, 3 St. Ry. Rep. 164, 72 N. E. 593.

*New Jersey.* — *Wheeler v. South Orange & M. T. Co.*, 70 N. J. L. 725, 3 St. Ry. Rep. 631, 58 Atl. 927.

*New York.* — *Sheeron v. Coney Island & B. R. Co.*, 78 App. Div. 476, 79 N. Y. Supp. 752.

*Pennsylvania.* — *Sweeney v. Union Traction Co.*, 199 Pa. St. 293, 49 Atl. 66.

*Texas.* — *San Antonio Traction Co. v. Bryant*, — Tex. —, 70 S. W. 1015.

Negligence of driver of team for jury where passenger on running-board crushed between car and horse standing near the car while merchandise was being unloaded. *McCormack v. Boston Elev. Ry. Co.*, 188 Mass. 342, 4 St. Ry. Rep. 463, 74 N. E. 599.

**73.** *Smith v. Kingston City R. Co.*, 169 N. Y. 616, 62 N. E. 1100; affg. 55 App. Div. (N. Y.) 143, 67 N. Y. Supp. 185; *Wolf v. Third Ave. R. Co.*, 67 App. Div. (N. Y.) 605, 74 N. Y. Supp. 336. See also cases cited at

§ 520. **Instructions to jury generally.** — It is said to be a salutary and well-established rule that if, looking at all the evidence and drawing such inferences therefrom as are just and reasonable, the court can say, as matter of law, that the plaintiff was not entitled to recover, an instruction to find for the defendant is proper.<sup>74</sup> But in this connection it is declared that those cases in which the court may instruct the jury to find negligence are such that both the facts and the inferences to be drawn from them are indisputable so that, if a verdict were returned against them it must be set aside as contrary to the whole of the evidence.<sup>75</sup> Mere clerical omissions or verbal inaccuracies are not sufficient to constitute reversible error where the terms employed by the court throughout the entire charge are clear and correct and the jury could not have misunderstood the true meaning and intent of the court.<sup>76</sup> The court may also properly comment on a failure of a party to call a witness as to a material fact which was peculiarly within the knowledge of the witness.<sup>77</sup>

§ 521. **Actions for injuries to passengers — Instructions to jury.** — Where, in an action for injuries to a passenger on a street

beginning of this chapter; *McAlan v. Trustees of N. Y. & B. Bridge Co.*, 56 App. Div. (N. Y.) 629, 67 N. Y. Supp. 1139.

74. *Camden & S. Ry. Co. v. Rice*, 137 Fed. 326, 4 St. Ry. Rep. 788.

75. *Brower v. Public Service Corp.*, 74 N. J. L. 193, 5 St. Ry. Rep. 710, 64 Atl. 1052.

76. *Young v. People's Gas & Elec. Co.*, 128 Iowa 290, 4 St. Ry. Rep. 292, 103 N. W. 788.

77. *Ripley v. Second Ave. R. Co.*, 8 Misc. Rep. (N. Y.) 449, 59 St. Rep. (N. Y.) 37, 28 N. Y. Supp. 683. The jury in a negligence case should not be instructed that a witness as to an important fact had either perjured himself or had told the truth, because the jury would have no oppor-

tunity to find that he might have been mistaken. *Smith v. Lehigh Valley R. Co.*, 170 N. Y. 390, 63 N. E. 338.

**When specific questions of fact** have been submitted to the jury to be passed upon by them, with instructions to render a general verdict also, the judge presiding at the trial has no power, after the jury have considered the specific questions of fact and rendered a general verdict, to dismiss the complaint upon the merits, nor to set aside the answers, save one, to the specific questions, nor to set aside the general verdict. In such case he should either nonsuit the plaintiff, or direct the jury to render a general verdict. *Hoey v. Met. St. Ry. Co.*, 70 App.

car, the issues are whether the plaintiff was injured by the careless starting of the car after it had stopped, or by her own negligence in attempting to board it before it had stopped, it is error to instruct that if the car, even if not quite at a standstill, was moving with such extreme slowness that a person might fairly undertake to board it, and while plaintiff was about boarding it the conductor suddenly started it so that it moved forward with a jerk, defendant's negligence would be established.<sup>78</sup> A charge that it was the duty of defendant carrier to use the highest care, and if it did not use such care, and as a result plaintiff received his injuries, he should have a verdict, predicates recovery on a result produced solely by defendant's fault.<sup>79</sup> It is safer to so frame instructions as to indicate the burden of proof without expressly referring to it; and therefore the court should have instructed the jury that, if plaintiff's injury was due to any defect in the car or cars on which she was riding, or the machinery or appliances connected therewith, and she did not, by her own want of ordinary care, contribute to the injury, they should find for her the damages she thereby sustained, unless they believed from the evidence defendant had exercised the utmost care and skill which prudent men are accustomed to use under similar circumstances to ascertain any defects in the car and appliances and secure their safety.<sup>80</sup> Where plaintiff claimed that she was injured by the negligence of defendant street car company in suddenly starting its car while she was boarding it at a crossing, a charge submitting to the jury whether the street corner was a regular station for receiving and discharging passengers was not erroneous on the ground that there was no claim that the corner was a "station;" that word being

Div. (N. Y.) 60, 74 N. Y. Supp. 1113. And see *Fay v. Brooklyn H. R. Co.*, 69 App. Div. (N. Y.) 563, 75 N. Y. Supp. 113.

**78.** *Metropolitan St. Ry. Co. v. Hudson*, (U. C. C. C. A., N. Y.) 51 C. C. A. 282, 113 Fed. 449. And see *Birmingham Ry. & E. Co. v. Ellard*, 135 Ala. 433, 33 So. 276.

**79.** *Southern Ry. Co. v. Roebuck*, 132 Ala. 412, 31 So. 611.

**80.** *Davis v. Paducah Ry. & L. Co.*, 24 Ky. L. Rep. 135, 68 S. W. 140. See also *Freeman v. Collins Park & B. Ry. Co.*, 107 Ga. 78, 43 S. E. 410; *West Chicago St. R. Co. v. Lieserowitz*, 197 Ill. 607, 64 N. E. 718; *affg.* 99 Ill. App. 591.

used in the instruction in the sense of "place."<sup>81</sup> In an action to recover for injuries received in attempting to board a street car, an instruction that, if the jury believed the evidence of the witnesses for the plaintiff, the act of the conductor in starting the car was negligent, was reversible error, because submitting only the question of the credibility of plaintiff's witnesses, and withdrawing the question of defendant's negligence and of plaintiff's contributory negligence, both of which questions should have been submitted, even though the evidence of plaintiff's witnesses was believed.<sup>82</sup> There being no evidence in the case that defendant had not made rules and regulations for the protection of its passengers, a charge that it was defendant's duty to make such rules and that failure to make them was negligence was properly refused.<sup>83</sup> In an action by a passenger to recover for injuries alleged to be due to the sudden starting of the car while she was alighting from it, it was held that an instruction that, if the jury believed the plaintiff had proven the allegations in one or more counts of the declaration by a preponderance of the evidence she could recover, did not submit a question of law to the jury.<sup>84</sup> Where the injury complained of was alleged to have been caused by the premature starting of a street car while plaintiff was trying to get off, an instruction defining the duties of railroad companies to passengers leaving trains or cars, and then stating that any breach of these duties would be such negligence as the jury might take cognizance of, was not erroneous, as authorizing a recovery for negligence not charged in the complaint.<sup>85</sup> A requested instruction in an action by a husband for personal injuries to his wife resulting from a defective board in a platform at one of defendant's stations, declaring without qualification that the wife was guilty of negligence if she stepped into the hole

**81.** *Maxey v. Met. St. Ry. Co.*, 95 Mo. App. 303, 68 S. W. 1063.

**82.** *Kellegher v. Forty-Second St., M. & St. N. Ave. R. Co.*, 171 N. Y. 309, 63 N. E. 1096; affg. 67 N. Y. Supp. 767.

**83.** *Merrill v. Met. St. Ry. Co.*, 73

App. Div. (N. Y.) 401, 77 N. Y. Supp. 122.

**84.** *Chicago & J. Elec. Ry. Co. v. Patton*, 219 Ill. 214, 4 St. Ry. Rep. 202, 76 N. E. 381.

**85.** *Gilmore v. Seattle & R. Ry. Co.*, 29 Wash. 150, 69 Pac. 743.

or on a rotten board without looking or taking any precaution to ascertain the danger, may be properly refused, as the situation may have been such that she could not see the hole, or the appearance may not have indicated a defect.<sup>86</sup> Where a passenger, in alighting from a street car at a temporary terminus selected by the defendant, stepped on a stone in the highway, and sustained injuries for which she brought suit, and the jury was instructed that the plaintiff could recover damages if the place selected by the defendant for her to leave the cars was not a safe one for the purpose, such instruction was erroneous, because it did not submit to the jury the question of defendant's negligence which was the gravamen of the action.<sup>87</sup> Where, in an action against a street railroad company for injuries sustained by plaintiff being thrown from an open car at or near a curve, the guard-rail along the side of the car being up at the time, it was shown by the uncontradicted evidence that the sole object of the rail was to prevent persons from boarding or leaving the car on that side, it was error to instruct the jury that the object of the bar was for their consideration, and they must determine whether, if down, it would have contributed to the plaintiff's safety.<sup>88</sup> A charge that an inspection of cars and appliances must be sufficient to insure the safety of passengers against accident is not capable of the construction that the word "insure" was meant in the limited sense that the company was an insurer; the court further explaining that the company must exercise such duty of inspection as in the judgment of those who understood the subject was sufficient to insure, etc.<sup>89</sup> Where a street railway company claimed that the injury to plaintiff's foot was due either to improper care and treatment after the injury, or to a diseased condition of the foot before and after the accident, and plaintiff's uncontradicted evidence showed that she struck the ground with such force as to sprain and injure her ankle, it was not error for

**86.** *Indianapolis St. Ry. Co. v. R. Co.*, 65 App. Div. (N. Y.) 451, 72 Robinson, 157 Ind. 414, 61 N. E. 936. N. Y. Supp. 814.

**87.** *Foley v. Brunswick Trac. Co.*, 66 N. J. L. 637, 50 Atl. 340.

**89.** *Leonard v. Brooklyn H. R. Co.*, 57 App. Div. (N. Y.) 125, 67 N. Y.

**88.** *Whitaker v. Staten Island M. Supp.* 985.

the trial judge to use the word "violently" in his charge, when speaking of the manner in which her foot struck the pavement on the starting of the car.<sup>90</sup> Where there is evidence, in an action for injuries received by a passenger in getting off a street car, that plaintiff had stepped from the car before its speed was increased, it is error to instruct that the injury was caused by such increase of speed.<sup>91</sup> Where plaintiff, suing a street car company for injuries received as a passenger, limits himself to a right to recover for the negligence of defendant, which defendant denies, contending that the injury was caused by unavoidable casualty, a charge that, though plaintiff was hurt without his fault, yet defendant was not liable, unless the jury find that the car went down the incline by reason of defendant's negligence, and if, by reason of any unavoidable casualty, it got beyond control of defendant's gripman, then there was no negligence, properly stated the law applicable.<sup>92</sup> Where defendant requested the court to charge that if the accident was caused by the act of the conductor, seeking to avoid an actual peril, as a person of ordinary prudence might have acted under the circumstances, defendant was not guilty of negligence; but the court instructed that if the conductor jostled the plaintiff in his voluntary action, or if the accident arose from the involuntary act of the conductor in the presence of peril to himself, or from plaintiff falling to the platform without any negligent starting of the car, defendant was not liable, the requested instruction should have been given.<sup>93</sup> Where there was some testimony that the car had come to a full stop and it was defendant's theory that plaintiff had stepped from the car while it was in motion, and there was testimony that just as the car stopped the conductor called "Change for Eighth avenue," and the court stated that he thought there had been some announcement which perhaps might have been taken by a passenger as an invitation to alight, and that perhaps the jury ought to consider whether

**90.** *McCormick v. Pittsburgh & B. Traction Co.*, 13 Pa. Super. St. 638.

**91.** *Root v. Des Moines City Ry. Co.*, 113 Iowa 675, 83 N. W. 904.

**92.** *Feary v. Met. St. Ry. Co.*, 162 Mo. 75, 62 S. W. 452.

**93.** *Kantrowitz v. Met. St. Ry. Co.*, 63 App. Div. (N. Y.) 65, 71 N. Y. Supp. 394.

that was negligence; that, if it had not been for that element in the case, he should have stated that there was absolutely no negligence on the part of those in charge of the car, the instruction was not prejudicial to defendant.<sup>94</sup>

§ 522. **Instructions to jury in other actions.**—In an action against a street car company for injuries, an instruction seeking to determine the question of ordinary care of the person injured solely by the length of time he had to deliberate as to the danger of his surroundings, leaving out the question as to whether he was himself negligent, is erroneous as being incomplete.<sup>95</sup> In

94. *Willis v. Met. St. Ry. Co.*, 63 App. Div. (N. Y.) 332, 71 N. Y. Supp. 554.

**For instructions as to degree of care required of defendant**, see *Memphis St. Ry. Co. v. Norris*, 108 Tenn. 632, 69 S. W. 325; *Clukey v. Seattle Elec. Co.*, 27 Wash. 70, 67 Pac. 379; *Elwood v. Chicago City Ry. Co.*, 90 Ill. App. 397; *Regensburg v. Nassau Elec. R. Co.*, 58 App. Div. (N. Y.) 566, 69 N. Y. Supp. 147; *Shay v. Camden & S. Ry.*, 66 N. J. L. 334, 49 Atl. 547; *Dehsoy v. Milwaukee Electric Ry. & L. Co.*, 110 Wis. 412, 85 N. W. 973; *Macon Consolidated St. R. Co. v. Barnes*, 113 Ga. 212, 38 S. E. 756.

**In an action to recover for injuries** sustained in being thrown from a street car, shortly after it had crossed the tracks of another company, in violation of a city ordinance requiring cars to stop before crossing tracks of other companies, the court may properly instruct that if the car was not stopped at the crossing, and the failure to stop contributed to its derailment, such failure could be considered in determining whether the company was liable. *Macon Consol.*

*St. R. Co. v. Barnes*, 113 Ga. 212, 38 S. E. 756.

**If the court explains to the jury** what constitutes an unavoidable accident, and instructs them that if the injury to the plaintiff was the result of such an accident the defendant is not liable, an instruction in the language above quoted is not open to the objection that "it did not permit the jury to consider the defense that said injury was caused by an unavoidable accident." *Id.*; *Galligan v. Old Colony St. Ry. Co.*, 182 Mass. 211, 65 N. E. 48; *Indianapolis St. Ry. Co. v. Hockett*, 159 Ind. 677, 66 N. E. 39.

95. *Galesburg Elec. Motor & P. Co. v. Barlow*, 98 Ill. App. 334.

**See the following cases for other specific instructions held to be erroneous:** *Davidson v. Met. St. R. Co.*, 75 App. Div. (N. Y.) 426, 78 N. Y. Supp. 352; *Muessman v. Met. St. Ry. Co.*, 76 App. Div. (N. Y.) 1, 78 N. Y. Supp. 571; *Ferri v. Union Ry. Co. of N. Y.*, 77 App. Div. (N. Y.) 301, 79 N. Y. Supp. 230; *Connor v. Metropolitan St. Ry. Co.*, 77 App. Div. (N. Y.) 384, 79 N. Y. Supp. 294; *Denison & S. Ry. Co. v.*

an action for personal injuries sustained through the alleged wilful act of defendant's motorman, an instruction that if the motorman knew that plaintiff was under the car fender, and knew that he could stop the car and prevent the injury, and did not do so, defendant was liable for the injury inflicted after the car could have been stopped, was erroneous, for, upon the facts stated in the instruction, it could not be said, as a matter of law, that the motorman was guilty of intentionally injuring the plaintiff after he fell under the fender.<sup>96</sup> An instruction that if there was another and reasonably convenient street which plaintiff could have taken, and he did not know how his horses would act at the approach of an electric car from behind, it was negligence for him to take his horses along a street where defendant's car ran, was properly refused as the correct rule was stated in an instruction that, if plaintiff knew that it would be dangerous to take his horses along this street, it was his duty to go on another street if he could do so without serious inconvenience.<sup>97</sup> In an action for the death of the driver of a wagon of the fire department which collided with defendant's street car, an instruction that if the motorman had no warning of the approach of the wagon, nor could have known it by vigilant watch before both

Carter, (Tex. Civ. App.) 70 S. W. 322, 71 S. W. 292; Parkinson v. Concord St. Ry. Co., 71 N. H. 28, 51 Atl. 268; Platt v. Albany Ry. Co., 170 N. Y. 115, 62 N. E. 1071; revg. 55 App. Div. (N. Y.) 636, 67 N. Y. Supp. 1144; Citizens' St. R. Co. v. Shepherd, 107 Tenn. 444, 64 S. W. 710; Sanitary Dairy Co. v. St. Louis Transit Co., (Mo.) 71 S. W. 448; Met. St. Ry. Co. v. Rouch, 66 Kan. 195, 71 Pac. 257; Stanley v. Cedar Rapids & M. C. Ry. Co., 119 Iowa 526, 93 N. W. 489.

**Instructions held to be correct stated in detail,** Reem v. St. Paul City Ry. Co., 82 Minn. 98, 84 N. W. 652.

**Instructions properly refused,**

Reilly v. Brooklyn H. R. Co., 65 App. Div. (N. Y.) 453, 72 N. Y. Supp. 1080.

**Error obviated by addition,** Bertsch v. Met. St. Ry. Co., 68 App. Div. (N. Y.) 228, 74 N. Y. Supp. 238.

For other instructions in various cases see index.

**96.** Indianapolis St. Ry. Co. v. Taylor, 158 Ind. 274, 63 N. E. 456.

**97.** Doran v. Cedar Rapids & M. C. Ry. Co., 117 Iowa 442, 90 N. W. 815. Where the driver of a vehicle approaching a car track at a street crossing, as though about to cross, it is for the jury whether the driver is using due care in attempting to cross and whether the person in charge of the car is negligent, and an instruc-

car and wagon reached the street crossing, and the wagon and car were then going at such speed that it was impossible for the motorman to avoid a collision, the jury should find for the defendant, was not open to the objection that it exonerated the motorman from all negligence prior to the time the car reached the intersection of the streets.<sup>98</sup> In an action against a street railroad for frightening a horse, evidence that the horse was frightened a week before by a dummy engine does not authorize an instruction that plaintiff cannot recover if the real cause of the accident was the disposition of the horse to frighten at cars.<sup>99</sup> Where there was no evidence of what was the ordinary speed of electric cars in the streets of the city, an instruction that if defendant's car was being managed with ordinary care, and was running at the ordinary speed of electric cars authorized to be operated on the streets of the city, plaintiff could not recover, was properly refused.<sup>1</sup> Where, in an action against a street railway for injuries received while attempting to cross the track, it appeared that plaintiff stepped on the track when the car was but a short distance from him, and that the driver shouted, and attempted to stop the car, and the negligence was principally predicated on the failure to equip the car with a suitable brake, it was error to instruct that notwithstanding negligence on the plaintiff's part he could recover, if the company, by exercising care, could have avoided the accident.<sup>2</sup> An instruction that it is not negligence in and of itself for a person to cross in front of an approaching car, but the jury have a right to consider all the circumstances attending the case, is erroneous in telling the

tion in substance otherwise is erroneous. *Cole v. Central Ry. Co.*, 103 Ill. App. 160.

**98.** *Guinney v. Southern Elec. R. Co.*, 167 Mo. 595, 67 S. W. 296.

**99.** *Oates v. Met. St. Ry. Co.*, 168 Mo. 535, 68 S. W. 906.

**1.** *Fullerton v. Met. St. Ry. Co.*, 170 N. Y. 592, 63 N. E. 1116; *affg.* 63 App. Div. (N. Y.) 1, 71 N. Y.

Supp. 326. See also *Richmond Traction Co. v. Hildebrand*, 98 Va. 22, 34 S. E. 888; *Fejdowski v. Delaware & H. C. Co.*, 168 N. Y. 500, 61 N. E. 888, as to instructions in the absence of evidence upon which they can be predicated.

**2.** *Csatlos v. Met. St. Ry. Co.*, 70 App. Div. (N. Y.) 606, 75 N. Y. Supp. 583.

jury that certain acts do not constitute negligence.<sup>3</sup> Where a boy attempted to run across a street car track, and was struck by a car, it was error to charge that, even if contributory negligence was assumed, the question remained whether the company, by reasonable care, could have avoided the consequences of the injured party's negligence, the facts not giving opportunity for the creation of a new situation after the boy had come into the position of danger, and the request being therefore inapplicable.<sup>4</sup> In an action for personal injuries to a child by being struck by a street car while she was running across the street the court properly refused to charge that "the motorman was not obliged to apply his brakes before he observed that the child was in danger," as the instruction eliminated any question of negligence on the motorman's part in failing to discover the danger sooner than he did.<sup>5</sup> Where a child was injured while playing on an abandoned turntable which was unfastened an instruction to find for plaintiff which omitted any hypothesis of defendant's negligence, or of its knowledge that the table was unfastened and was being revolved by children at play or that by ordinary care as,

**3.** *West Chicago St. Ry. Co. v. Callow*, 102 Ill. App. 323. The fact that a person attempts to cross in front of a street car seen to be approaching does not of itself constitute contributory negligence. *Campbell v. Los Angeles Trac. Co.*, 137 Cal. 565, 70 Pac. 624. Evidence considered, and held, that the negligence of a pedestrian, injured while passing in front of an electric car, was so plain as a matter of law that the court properly directed a verdict for defendant. *Metz v. St. Paul City Ry. Co.*, 88 Minn. 48, 92 N. W. 502.

**4.** *Sciurba v. Met. St. Ry. Co.*, 73 App. Div. (N. Y.) 170, 76 N. Y. Supp. 772. An instruction that it is not negligence in and of itself for a person to cross in front of an approaching car but the jury have the

right to consider all the circumstances of the case, is erroneous in telling the jury that certain acts do not constitute negligence. *West Chicago St. R. Co. v. Callow*, 102 Ill. App. 323. So, with an instruction which is abstract and lacking in applicability to the facts. *Holmes v. Ashtabula T. T. Co.*, 10 Ohio C. D. 638.

**5.** *Colabel v. Met. St. Ry. Co.*, 74 App. Div. (N. Y.) 505, 77 N. Y. Supp. 584. An instruction that if the motorman failed to use ordinary care to discover plaintiff on the track, or was guilty of negligence in failing to stop his car in time to avoid injury to plaintiff after having discovered her on the track, plaintiff was entitled to recover, was held justified in *San Antonio Traction Co. v. Court*,

charged in the petition, it could have known of such condition, was held to be erroneous.<sup>6</sup> In an action for an injury resulting from defendant's negligence in placing an obstruction in a street, it is for the jury to determine whether the act of placing an iron bar in the street in such a position that plaintiff came in contact therewith was negligence.<sup>7</sup> The refusal of an instruction that the plaintiff, injured at a crossing by a street car, cannot recover if, by the exercise of reasonable care, he might have seen the car approaching in time to have avoided the accident, is not erroneous when considered in connection with an instruction given that plaintiff's failure to look and listen will prevent recovery.<sup>8</sup> An instruction in an action against a city and street railroad company for a death, alleged to have been caused by a rail in the railroad track being allowed to remain above the level of the street, that if defendants permitted the surface of the street to become lower than the rail, so as to interfere with the safe crossing of the street with vehicles, and if deceased was caused to fall from his wagon and was fatally injured by reason thereof, while in the exercise of due care, the plaintiff could not recover, was erroneous, as taking from the jury the question of negligence and the question of proper care in keeping the street in proper repair, though such instruction was immediately preceded by an instruction that defendants were only liable for failure to use ordinary care.<sup>9</sup> Where defendant asked the court to instruct that, if its tracks were covered with snow, it had the right to remove it therefrom, provided that in doing so it exer-

(Tex. Civ. App.) 71 S. W. 777. See also *Gray v. St. Paul City Ry. Co.*, 87 Minn. 280, 91 N. W. 1106.

6. *Edwards v. Metropolitan St. Ry. Co.*, 112 Mo. App. 656, 5 St. Ry. Rep. 600, 87 S. W. 587.

7. *Parkes v. Met. St. Ry. Co.*, 37 Misc. Rep. (N. Y.) 844, 76 N. Y. Supp. 983.

8. *Nashville Ry. Co. v. Norman*, 108 Tenn. 324, 67 S. W. 479. A requested instruction that, if plaintiff

failed to look for an approaching car, he was guilty of contributory negligence, was improperly modified by substituting "Of course, if plaintiff was reckless — failed to look up and down, heedless of consequences — and this car was in sight \* \* \* clearly he was guilty of negligence." *McKinley v. Met. St. Ry. Co.*, 77 App. Div. (N. Y.) 256, 79 N. Y. Supp. 213.

9. *Citizens' Ry. Co. v. Gossett*, (Tex. Civ. App.) 68 S. W. 706.

cised ordinary care, to which instruction the court added "and, where the snow might reasonably have been deposited so as not to obstruct the way of pedestrians passing along the crosswalk, the depositing of snow at such a point so as to create an obstruction is a negligent act," the instruction as amended was proper.<sup>10</sup> Where plaintiff, while at work between the tracks of a street railway, was struck by defendant's car, a charge that the defendant should "do all in its power to see that no injury happens to any of the workmen" might, if standing alone, hold the defendant to a higher obligation than the law warrants, but is not error where the court, on request, modified such expression by adding that the motorman was compelled to use the care which an ordinarily prudent man would use under the circumstances.<sup>11</sup> In an action against a street car company for damages in negligently causing the death of a person, under a declaration charging that its car ran against and struck the deceased, an instruction which tells the jury that if they find, from the evidence, that the deceased ran his vehicle into the side of the car, and thereby caused the accident, their verdict should be for the defendant, is proper, and should be given.<sup>12</sup> An instruction as to contributory negligence in a street crossing accident case, which does not state any facts in reference to defendant's negligence, is incorrect in stating that, in case certain facts are found, the finding "should be for plaintiff," without specifying that such finding is to be confined to the determination of contributory negligence.<sup>13</sup> While the motorman was not required to stop his car until, from the circumstances, he had reason to believe that plaintiff's intestate would be endangered unless it was stopped, an instruction asked by defendant on that subject was properly refused, as it was argumentative, and besides there was proof from which the jury might have inferred that, if the car had not been running too

**10.** *Newport News & O. P. & Elec. Co. v. Bradford*, 100 Va. 231, 4 Va. Sup. Ct. Rep. 219, 40 S. E. 900.

**11.** *Third Ave. Ry. Co. v. Krausz*, (U. S. C. C. A., N. Y.) 50 C. C. A. 293, 112 Fed. 379.

**12.** *South Chicago St. Ry. Co. v. Kinnare*, 96 Ill. App. 210.

**13.** *Citizens' St. R. Co. v. Hamer*, 29 Ind. App. 426, 62 N. E. 658, 63 N. E. 778.

fast, it might have been stopped, or checked sufficiently, before reaching the intestate, to avoid the injury to him, after the motorman perceived the danger.<sup>14</sup> Where plaintiff, while driving a wagon into the street, waited until a street car had passed and then started to cross the track, when the car started backward, colliding with and injuring her, an instruction was properly refused which stated that, if the conductor saw plaintiff was out of the way of danger before he gave the signal to back the car, he had the right to rely on her avoiding danger and had no further duty to perform, and that it was as much plaintiff's duty to keep out of danger as of the conductor to operate the car in a prudent manner.<sup>15</sup> In a suit for damages for the killing of a boy by a street car, an instruction that it was the duty of the deceased to have exercised such a degree of care and prudence in crossing the track, and in looking and listening for the approaching car, as an ordinarily prudent boy, of like age and intelligence, would have exercised under like circumstances, was proper, since whether or not such a boy would look and listen before going on the track was still left a question for the jury.<sup>16</sup> Where, under the evidence as given by defendant's witnesses in an action to recover for the death of a child killed on a street car track, it was the plain duty of a gripman to have sounded his gong, an instruction charging the gripman with that duty was not erroneous, in that it failed to set out all the evidence introduced by both parties establishing the necessity of such an act on

**14.** *Louisville Ry. Co. v. Will's* Adm'r, 23 Ky. L. Rep. 1961, 66 S. W. 628. An instruction that if the jury found the child was guilty of contributory negligence, the question remained whether defendant's driver by the exercise of reasonable care and prudence, might have avoided the consequences of the child's negligence, was erroneous, where there was no intervening circumstances, and the only issues presented were the negligence of the defendant and the contributory negligence of the child with

respect to one set of circumstances. *Delkowsky v. Dry Dock, E. B. & B. R. Co.*, 78 App. Div. (N. Y.) 632, 79 N. Y. Supp. 1104. See also *Trauber v. Third Ave. R. Co.*, 80 App. Div. (N. Y.) 37, 80 N. Y. Supp. 231; *Wagner v. Met. St. Ry. Co.*, 79 App. Div. (N. Y.) 591, 80 N. Y. Supp. 191.

**15.** *Central Ry. Co. v. Knowles*, 93 Ill. App. 581; *affd.*, 191 Ill. 241, 60 N. E. 829.

**16.** *Ruschenberg v. Southern Elec. R. Co.*, 161 Mo. 70, 61 S. W. 626.

his part.<sup>17</sup> A street railway company having the right to regulate the conduct of its business by reasonable and necessary rules, in an action against it for injuries, an instruction so informing the jury was proper, and its refusal was erroneous.<sup>18</sup> In an action against a street car company for injuries sustained by collision, an instruction reciting that "he (plaintiff) had, you may say, a right to assume that a trolley car would not run into him" is not erroneous where, taken in connection with the whole charge, it was no more than a statement to the jury that the plaintiff might assume that the company, having equal rights with him and he having equal rights with it in the public highway, would so exercise those rights as not to damage him.<sup>19</sup> Where there was no evidence of what was the ordinary speed of electric cars in the streets of the city, an instruction that if defendant's car was being managed with ordinary care, and was running at the ordinary speed of electric cars lawfully authorized to be operated on the streets of the city, plaintiff could not recover, was properly refused.<sup>20</sup> An instruction that, if defendant's car was running at a prohibited rate of speed, the jury would be justified in finding defendant guilty of negligence, and if such negligence caused the injury complained of the verdict should be for the plaintiff, was not erroneous, as misleading the jury, when taken in connection with other instructions given, that the verdict should be for defendant, though negligent, if plaintiff could have avoided the injury.<sup>21</sup> Where an instruction, otherwise correct, fails to submit to the jury that the act of an employee was within the scope of his employment, and the party who urges an objection on this ground did not ask a proper instruction on the trial to supply the defect, and the case was tried on both sides on the theory that if the employee committed the acts

**17.** *Schmidt v. St. Louis R. Co.*, 163 Mo. 645, 63 S. W. 834.

**18.** *Lesser v. St. Louis & S. Ry. Co.*, 85 Mo. App. 326.

**19.** *Shelly v. Brunswick Trac. Co.*, 65 N. J. L. 639, 48 Atl. 562.

**20.** *Fullerton v. Met. St. Ry. Co.*, 63 App. Div. (N. Y.) 1, 71 N. Y. Supp. 326.

**21.** *Traver v. Spokane St. Ry. Co.*, 25 Wash. 225, 65 Pac. 284.

charged in the petition the defendant was liable, it is not erroneous.<sup>22</sup>

§ 523. **Instructions to jury — Contributory negligence.** — Where no evidence has been introduced tending to show contributory negligence it is error for the court to introduce such element in its charge to the jury and give instructions thereon.<sup>23</sup> In an action for injuries received by a passenger in attempting to leave a moving street car which apparently was about to collide with a locomotive, the refusal to give an instruction that if the plaintiff acted contrary to the way an ordinarily prudent person would have acted, and this conduct contributed to the injury, she could not recover, was error, where the subject of such instruction was not covered by any other instruction in the case.<sup>24</sup> It was error to instruct the jury that it was the duty of the plaintiff, when going upon defendant's cars, "to exercise due care and caution, use her eyes, and act with reasonable care and judgment for her own safety, more especially if she found the car unusually overcrowded with passengers," but the court should instead have instructed the jury that it was incumbent on plaintiff while on the car "to exercise such care and caution as might be reasonably expected of a person of ordinary prudence situated as she was."<sup>25</sup> A requested instruction that if the jury find that plaintiff signaled for the car to be stopped, and after it had stopped stepped on the footboard, but "voluntarily and without necessity" stepped to the ground while the car was in motion, verdict should be for defendant, is objectionable as leaving the jury to treat the necessity that was to govern the plaintiff's conduct under the circumstances as an absolute necessity; the evidence showing that she was crippled in her left limb from rheumatism; that when the car started she was in the act of putting her left foot on the

22. *Wahl v. St. Louis Transit Co.*, 203 Mo. 261, 6 St. Ry. Rep. 96, 101 S. W. 1.

23. *Cincinnati Traction Co. v. Forrest*, 73 Ohio St. 1, 4 St. Ry. Rep. 906, 75 N. E. 818.

24. *Selma St. & Suburban Ry. Co. v. Owen*, 132 Ala. 420, 31 So. 598.

25. *Davis v. Paducah Ry. & L. Co.*, 24 Ky. L. Rep. 135, 68 S. W. 140. See also *Frank Bird Trans. Co. v. Krug*, 30 Ind. App. 602, 65 N. E. 309.

ground, and that in the effort to alight she was holding to the handle-bar of the car; she thus, by defendant's negligence, being put in a position of danger calculated to alarm and disconcert her and prevent exercise of clear judgment, and therefore being held only to ordinary care under the circumstances.<sup>26</sup> Where defendant denied its negligence and alleged contributory negligence, an instruction to find for defendant if the injuries were the result of an accident was improperly modified by adding the words "that was not caused by defendant's negligence," since, as modified, it impliedly authorized a verdict for plaintiff, though guilty of contributory negligence.<sup>27</sup> Where plaintiff was injured by the premature starting of a street car, which he had attempted to board while it was moving "at a snail's pace," an instruction, in an action for his injuries, that the usual invitation to board a public vehicle is that it stops, and, in all ordinary cases, to get aboard a moving public vehicle is imprudent, is erroneous, as applying to street railroads the law applicable to steam railroads; it not being contributory negligence *per se* for a person to board a moving street car.<sup>28</sup> Where a count of a complaint ascribes the injury to one attempting to board a street car to the negligence of defendant in allowing said car to give a sudden lurch while a passenger was attempting to board the car, and there is no evidence from which the jury had a right to infer that there was any sudden lurch, it was error to refuse to charge that, if the jury believed the evidence, they could not find for plaintiff on such count.<sup>29</sup> An instruction in an action against a railroad company for injuries to a pregnant passenger, which states that it was the duty of the plaintiff to use reasonable care, and that no recovery can be had if the journey was dangerous, is not defective in not stating that the degree of care so required was the care

**26.** *United Rys. & Elec. Co. v. Beidelman*, 95 Md. 480, 52 Atl. 913.

**27.** *Maxey v. Met. St. Ry. Co.*, 95 Mo. App. 303, 68 S. W. 1063.

**28.** *Lobsenz v. Met. St. Ry. Co.*, 72

App. Div. (N. Y.) 181, 76 N. Y. Supp. 411.

**29.** *Birmingham Ry. & Elec. Co. v. Brannon*, 132 Ala. 431, 31 So. 523. And see *Indianapolis St. Ry. Co. v. Whitaker*, 160 Ind. 125, 66 N. E. 433.

required of persons in such physical condition.<sup>30</sup> The insertion of the word "voluntarily" in instructions requested by defendant, so as to make them read that if plaintiff's injuries "were caused by his voluntarily stepping from a car," etc., and that if "plaintiff did voluntarily step from said car" did not alter their meaning and was no cause for complaint.<sup>31</sup> It was error to modify an instruction that plaintiff could not recover if the jury should find him guilty of contributory negligence by inserting "unless the defendant's motorman could have avoided the accident by the exercise of due care after he saw, or ought to have seen, plaintiff's peril," where the instruction, as modified, was not warranted by the evidence.<sup>32</sup> In an action by a passenger against a street car company for injuries sustained in getting off of the car, it is not error to refuse to charge that it was contributory negligence for plaintiff to leave the car while in motion, since it was a question of fact for the jury.<sup>33</sup> An instruction, in an action for injury claimed to have been received by plaintiff being jolted off a street car, that it was a question for the jury whether it was a careless thing for plaintiff to get down on the step of the car, cannot be complained of because stating that, if they believed that "that carelessness" contributed to his being jolted off, he could not recover.<sup>34</sup>

**30.** *St. Louis & S. W. Ry. Co. v. Ferguson*, 26 Tex. Civ. App. 460, 64 S. W. 797. And see *Citizens' St. R. Co. v. Shepherd*, 30 Ind. App. 193, 65 N. E. 765.

**31.** *Gorman v. St. Louis Trans. Co.*, 96 Mo. App. 602, 70 S. W. 731.

**32.** *Baltimore Consol. Rys. Co. v.*

*Armstrong*, 92 Md. 554, 54 L. R. A. 424, 48 Atl. 1047.

**33.** *Willis v. Met. St. Ry. Co.*, 63 App. Div. (N. Y.) 332, 71 N. Y. Supp. 554.

**34.** *Foster v. Union Traction Co.*, 199 Pa. St. 494, 49 Atl. 270.

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